82-1325

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

I.A.M. NATIONAL PENSION FUND,
Petitioner,
v.

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Petitioner is a jointly-trusteed, collectively-bargained, multiemployer labor-management pension fund designed in compliance with, and operating under, the provisions both of Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), and of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* The court of appeals held that a pension plan rule adopted by petitioner's trustees, under which plan participants' past service credits (*i.e.*, credits attributable to their eligible employment with their employer before that employer began to contribute to the plan) are cancelled if the employer's obligation to contribute to the plan terminates, is neither necessary nor reasonable, and is therefore unlawful. Under these circumstances, the questions presented by this petition are:

1. Whether, after *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982), federal courts have jurisdiction to review for "reasonableness" substantive pension fund eligibility standards adopted by the fund trustees?

2. Whether federal courts have jurisdiction under Section 302(c)(5) of the LMRA or Section 404(a)(1) of ERISA to require pension funds regulated by those statutes to prove that pension eligibility standards which Congress explicitly authorized in ERISA are "reasonable" or "necessary"?*

* All parties to this proceeding are named in the caption of the case in this Court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The I.A.M. National Pension Fund ("the Fund") respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment entered by that Court on August 20, 1982, in *Madge H. Elser and Margaret E. Thomas vs. I.A.M. National Pension Fund*, Nos. 80-6095 and 81-5024.

OPINIONS BELOW

The opinion of the court of appeals in this case is reported at 684 F.2d 648, and is reproduced in the Appendix to this Petition at pages 28a-46a. The court's order denying the Fund's petition for rehearing and suggestion for rehearing *en banc* was entered on November 10, 1982, and is reproduced at page 47a of the Appendix. The unreported memorandum opinion issued by the district court on September 5, 1980, is reproduced in the Appendix at pages 1a-9a. The district court's findings of fact and conclusions of law were entered on November

26, 1980, and amended on April 20, 1981. They are reproduced in the Appendix at pages 10a-27a.

JURISDICTIONAL STATEMENT

The opinion of the court of appeals was issued on August 20, 1982. A petition for rehearing and suggestion for rehearing *en banc* was timely filed on September 2, 1982. That petition was denied, and the suggestion for rehearing *en banc* rejected, by order entered on November 10, 1982.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c)(5), provides

> (c) The provisions of this section shall not be applicable
>
> * * * *
>
> (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed

basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities;

Section 203(a)(3)(E)(i) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. § 1053(a)(3)(e)(i), provides

(E)(i) A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

Section 203(b)(1)(C) of ERISA, 29 U.S.C. § 1053 (b)(1)(C), provides

> (b)(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:
>
> . . . .
>
> (C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan, defined by the Secretary of the Treasury;

Section 404(a) (1) of ERISA, 29 U.S.C. § 1104(a) (1), provides

> (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

STATEMENT OF THE CASE

A. Introduction.

Petitioner IAM National Pension Fund ("the Fund") is a collectively bargained, jointly-trusteed labor-management pension fund, organized in 1960 by the International Association of Machinists and Aerospace Workers, AFL-CIO ("the IAM") and certain employers of persons who were represented for collective bargaining by affiliates of the IAM. The Fund complies, in design and operation, with the explicit requirements of Section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5).[1] The Fund is a "multiemployer plan" within the meaning of Section 3(37) of ERISA, 29 U.S.C. § 1002(37), and a "defined benefit plan" within the meaning of Section 3(35) of ERISA, 29 U.S.C. § 1002(35).

Under the Rules of the Fund's Benefit Plan A,[2] covered employees (*i.e.*, employees working under collective bargaining agreements which obligate their employers to contribute to the Plan) must have at least 10 years of

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[1] Thus, the Fund's Board of Trustees is composed of equal numbers of IAM-designated and employer-designated members; employer participation in and contributions to the Fund may be secured only through collective bargaining, and are permitted only on such terms as are detailed in the written agreements which that bargaining produces. *See* 29 U.S.C. § 186(c)(5)(B); *see also National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322 (1981).

[2] For historic reasons not here pertinent, when this litigation arose the Fund administered three separate plans of pension benefits. The controversy from which the questions presented here arise involves the rules governing the largest of those three defined benefit plans, known in the Fund as Benefit Plan A.

"credited service" to qualify for pension benefits. "Credited service" falls into two categories: in general, "future service" credits are granted for all the time an employee works under a collective bargaining agreement imposing a contribution obligation on the employer, while "past service" credits are granted to all employees working for an employer on the date that employer's contractual obligation to contribute commences, for their prior eligible employment with that employer. This system of granting pension credit for both "paid" and "unpaid" work time allows older, long-service employees to receive full pension benefits upon retirement from covered employment, even though in many individual cases no contributions will have been paid to the Fund for much of the service upon which such benefits are based.

Because benefits in the Plan are calculated on the basis of both "past" and "future" service, however, this system necessarily entails the assumption by the Fund of an immediate unfunded past service liability whenever a new employer joins the Plan.[3] Any unfunded past service liability left behind by employers who withdraw after relatively short periods of participation must therefore be made up by the remaining participants and employers.[4]

As a measure of protection against the risk that an employer's participation will *not* continue long enough to discharge his unfunded liability, the Fund Trustees have adopted certain safeguards against employer termination which enable the Fund to avoid any further liabil-

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[3] *See e.g., Lodge 199, IAM and Baltimore Rebuilders, Inc.*, 235 NLRB 1491, 1496-97 (1978), *review denied sub nom. Baltimore Rebuilders, Inc. v. N.L.R.B.*, 611 F.2d 1372 (4th Cir. 1979), *cert. denied*, 447 U.S. 922 (1980).

[4] ERISA requires covered pension plans to amortize their unfunded past service liability over a 30- or 40-year period. *See* 29 U.S.C. § 1082. *Cf. Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 364, n. 7 (1980).

ity attributable to a terminated employee group's "past service". At all times pertinent to this controversy, Article IX, § 4, of the Rules of Plan A has provided, in essence, that termination of participation by any employer who thereafter continues in the same or a related business will automatically cause the cancellation of past service credits for all covered employees of that employer who have not already retired. Future service credits are not affected, nor is the benefit status of any employee who has already been awarded a pension. These provisions are intended to protect the Fund against the "dumping" of unfunded liability attributable to past service by providing employers and employee groups with an incentive to insure that employers' contributions to the Fund continue.[5]

Application of the Article IX, § 4, past service cancellation provisions will not, by itself, cause the denial of pension benefits to any participant. Rather, invocation of that Rule will mean only that affected participants thereafter will be entitled to pension vesting and benefit accrual credit only for those years of employment with the terminated employer during which that employer contributed to the Plan.[6]

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[5] An employer's collectively-bargained obligation to contribute to the Fund can terminate by operation of any one of several processes. Thus, the employees may, as happened in this case, elect to decertify their union, or the union and the employer may enter into a new collective bargaining agreement which no longer requires pension contributions. *See Central Tool Co. v. IAM National Pension Fund*, 523 F. Supp. 812 (D.D.C. 1981) (appeal pending). In any event, decisions to enter and leave the Fund must be made by collective bargaining parties; the Fund's Trustees have no control over those decisions. *See N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322.

[6] The cancellation provision in Article IX, § 4, does not apply to certain classes of employees, among whom are employees who left covered employment more than two years before the employer

B. Respondents' Participation in Plan A.

Respondents Madge Elser and Margaret Thomas are former employees of the Waste King Corporation of Los Angeles, California. Waste King began paying contributions to Plan A on January 1, 1969, pursuant to a collective bargaining agreement with an IAM Local Lodge ("the Union") representing its production and maintenance employees. Under that and succeeding collective bargaining agreements, Waste King's contributions to Plan A continued until January 31, 1975, when the contract between Waste King and the Union expired and was not renewed. Shortly thereafter, on February 28, 1975, the employees in the bargaining unit represented by the Union voted, in an election held under National Labor Relations Board auspices,[7] to decertify the Union as their collective bargaining representative. Upon learning of these events, the Fund notified both Waste King and the Union that under Article IX, § 4, of the Plan A Rules, the termination of Waste King's contributing employer status resulted automatically in the cancellation of past service credits for all covered employees still in Waste King's employ.

Respondents had been employed in Waste King's production and maintenance unit throughout the period of Waste King's participation as a contributing employer in Plan A, and were among the employees to whom the Plan A Rules conditionally extended the right to receive credit for past service. Since both were still actively employed by Waste King when Waste King's participation terminated, they were among the employees whose past service credits in Plan A were cancelled by operation of Article IX, Section 4.

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terminated his participation, or within thirty days after that date. Additionally, affected employees who earn five years of future service with another contributing employer within eight years after their employer's termination will have their cancelled past service credit restored.

[7] *See* 29 U.S.C. § 159(c).

C. Proceedings Below.

After both respondents had applied to the Fund for Plan A pensions, and those applications had been rejected for lack of sufficient credited service,[8] respondents brought this action in the district court for the Central District of California on June 30, 1978.[9] They alleged that the Rules of Plan A which require the cancellation of past service credit in these circumstances violated Section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5) (1976), and Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1) (1976). Invoking the district court's subject matter jurisdiction under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), and under Section 302 of the LMRA, respondents sought declaratory and injunctive relief which would require the Fund unconditionally to reinstate their past service credits in Plan A for all purposes.

Upon submission on a stipulated record, the district court accurately recognized that the Plan A Rules made the right to benefit from credit for past service a conditional one, subject to continuation of the employer's obligation to contribute (App. 2a). The court also recognized that the Plan A Rules exempt from the past service cancellation provisions any employees who retire and qualify for pensions while their employer continues to contribute, and that the Rules contain certain "relief provisions" (*see* n.6, at p. 7, *supra*) designed "to mitigate

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[8] Both Thomas and Elser retired from Waste King after Waste King's participation in Plan A had terminated. Because their past service credits had been cancelled, their only recognized credited service in Plan A was future service of approximately six years. Under the Plan A Rules then (and now) in effect, and in conformity with one of the three alternative minimum vesting schedules authorized in ERISA, ten years of credited service is necessary to vest. *See* 29 U.S.C. § 1053(a)(2)(A).

[9] The action was brought as a class action, and two subclasses, containing a total of approximately 75 employees, were certified by the district court.

the harsh consequences of an employer's non-payment" (App. 2a).

Nevertheless, the court found the cancellation provisions in Article IX, § 4, to be "arbitrary and capricious on their face and as applied to plaintiffs" (App. 6a), in violation of Section 302(c)(5), because the operation of one of the relief provisions in the Rule enabled employees who had less future service in the Plan than did respondents to avoid cancellation of past service.

Recognizing that past service credits represent an unfunded liability to the Fund, which the Fund must "amortize" through future contributions, the court nonetheless rejected the Fund's use of its past service cancellation rules because, in the court's judgment,

> there are other methods of accomplishing this [*i.e.*, of protecting the fund against the assumption of unamortized past service liability] than treating groups of employees unequally, especially when the employees for whom the greatest amount of contributions have been made are the ones who lose their pensions.

(App. 8a).[10]

The court concluded that Article IX, § 4, violated ERISA § 404(a)(1) as well, since in the court's view, any

[10] The court also concluded that the Fund's past service cancellation rules violated what it described as the "sizeable exclusion/reasonable justification" standard which it extrapolated from § 302(c)(5). On the issue which it identified as one of "reasonable notice," the court found that respondent Thomas "did not receive proper notice of the cancellation provision and relief provisions" (App. 6a), notwithstanding the stipulated facts that copies of the Plan A Rules had been supplied to Waste King, and to the Union for distribution, when Waste King commenced participation in the Fund, and that copies of the Rules had been mailed by the Fund in 1974 to each covered employee at his/her last known address. The court found that respondent Elser *did* receive adequate notice of the cancellation provisions because she had attended a union meeting at which the consequences of decertifying the union were discussed (App. 7a).

trustee conduct found to be "arbitrary and capricious" under Section 302(c)(5) necessarily also violated the trustees' obligation under Section 404(a)(1) to discharge their duties with respect to the plan "solely in the interest of the participants and beneficiaries." The court readily acknowledgd that ERISA "permits a multi-employer plan to provide for the cancellation of past service credit upon an employer's cessation of contributions," but accorded that legislative judgment no significance in light of the court's own determination that the Plan A past service cancellation provisions "are otherwise objectionable because they are discriminatorily applied." (App. 8a.)[11]

On the Fund's appeal, the Court of Appeals for the Ninth Circuit affirmed. Relying on its earlier opinion in *Ponce v. Construction Laborers' Pension Trust*, 628 F.2d 537, 543 (9th Cir. 1980), and without citing the language of any Fund document, the court found that

> the purpose of *the Fund* is to provide benefits to as many intended employees as is economically possible while protecting the financial stability of the Fund.

(App. 43a (emphasis added)).[12] The court recognized that

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[11] The court's ERISA analysis concluded with a single cryptic sentence, for which no authority was cited:

> Also the fact that the cancellation and relief provisions are contained in the plan documents does not meet the standard under ERISA, which requires that the provisions be reasonable under the circumstances.

App. 8a.

[12] The court's reliance on *Ponce*, which had in turn relied upon *Gaydosh v. Lewis*, 410 F.2d 262, 266 (D.C. Cir. 1969), for this proposition, was a fundamental error. The *Gaydosh* court had found, from its examination not of § 302(c)(5), as *Ponce* held, but of the fund documents before it in that case, that this was the "purpose" of *that fund*. The *Ponce* court took that language entirely out of the *Gaydosh* context and held that it described the

> the fiscal integrity of the plan depends upon continuing contributions from the employer to pay not only for the current service credit but also to amortize the liability for past service credit[,]

(App. 43a) but refused to sanction the Fund's use of its past service cancellation rule because the Fund had not made a particularized actuarial demonstration *to the court in this case* that such cancellation was "necessary or reasonable to protect the financial stability of the fund [footnote omitted]" (App. 46a). Following the analytical lead of the district court in *Central Tool Co. v. IAM National Pension Fund*, 523 F. Supp. 812 (D.D.C. 1981) (appeal pending), the court ruled that

> the Fund has the burden of showing some rational nexus between the Fund's purpose and the forfeiture provisions.

(App. 45a-46a). Since the Fund had relied upon the provisions in ERISA which specifically authorize past service cancellation in the event of termination of employer participation, *see* text at 18-20 *infra*, and since, by definition, there is no precise "fit" between contributions and benefits in a defined benefit plan, the Fund had offered no proof that cancellation was actuarially required in this instance. The court concluded that, because the Fund had failed "to meet its burden of showing a reasonable relationship between the cancellation provisions and the purpose of the fund," (App. 46a), those provisions were "arbitrary and capricious" (*id.*), and affirmed.

The Fund petitioned for rehearing and suggested that the matter be reheard *en banc*, contending that the court

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"purpose" of § 302(c)(5). The erroneous *Ponce* construction of the primary purpose of § 302(c)(5), relied upon below, clearly cannot be reconciled with this Court's holding in *N.L.R.B. v. Amax Coal Company*, 453 U.S. at 331, that "the *'sole purpose'* of § 302(c)(5) is to ensure that employee benefit trust funds 'are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them'" (emphasis added).

had ignored both the Congressional determination, evidenced in ERISA, that cancellation of past service credit in these circumstances is appropriate, and this Court's determination in *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982), that Section 302(c)(5) does not empower the federal courts to redesign pension plan eligibility rules in order to satisfy the court's own standards of reasonableness.[18] That petition was denied on November 10, 1982 (App. 47a).

REASONS FOR GRANTING THE WRIT

I. The Conflict Between The Court of Appeals' Decision And This Court's Decision in *United Mine Workers of America Health and Retirement Funds v. Robinson* Presents An Important Issue Of The Proper Role Of Federal Courts In The Enforcement of ERISA.

The court of appeals' decision in this case constitutes a patently unauthorized exercise by the court of an assumed power to substitute its own judgment for that of pension fund trustees on questions of allocation of pension benefits among eligible participants and beneficiaries. The court purported to find this authority in a line of appellate court decisions construing the purpose and scope of LMRA § 302(c)(5), a line which petitioner believes this Court has unequivocally repudiated. The court compounded its error, moreover, by holding that the amorphous, ill-defined standard of "reasonableness" formerly held (by the court below and several other courts of appeals) to be implicit in Section 302(c)(5) is implicit in ERISA § 404(a)(1) as well.

In the court's view, Section 404(a)(1) empowers courts to apply this reasonableness test to each plan's eligibility rules on a case by case basis, and to require the plan to demonstrate that its rules are reasonable both facially

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[18] *Robinson* was decided on March 8, 1982, two days before this case was argued in the court of appeals, and approximately five months before it was decided.

and as applied (App. 37a-38a). Petitioner here could not have met the burden imposed by the court without proving, by actuarial evidence, that Waste King's contributions were inadequate to pay for the current service credits, and to amortize the liability for past service credits, of the particular class of Waste King participants (App. 46a). Under the court's analysis, any pension plan benefit eligibility standard could, at the instance of any participant who could not satisfy the prescribed standard, be challenged in court, and the plan then required to demonstrate to the court's satisfaction that the rule is reasonable.

Both the patent conflict between the decision below and *Robinson*, and the significant impact that decision will have on the development of the law under ERISA and the administration of employee benefit plans governed by that "comprehensive and reticulated" regulatory scheme, *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980), make this Court's review and correction of the decision below necessary.

This Court ruled last Term that Section 302(c)(5) of the LMRA does not empower federal courts to " review for reasonableness" those terms of a collective bargaining agreement "allocating health benefits among potential beneficiaries of an employee benefit trust fund." *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. at 564. The Court's review of the legislative history of Section 302(c)(5), and of its own prior decisions construing that provision, led to the unanimous conclusion that Section 302(c)(5)

> was meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders.

Robinson, 455 U.S. at 571-72. That statute does *not*, in this Court's view, impose any

> general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness.

Id. at 574.

The court below dismissed *Robinson* as inapplicable to this case. Noting that in *Robinson* this Court had reserved the question of "whether [under § 302(c)(5)] federal courts sitting as courts of equity are authorized to enforce [traditional fiduciary duties]", the court concluded that it, too, could avoid that issue. Instead, the complaint having alleged violations of ERISA § 404 as well as of LMRA § 302(c)(5), the court exercised its jurisdiction under Section 502 of ERISA, 29 U.S.C. § 1132. (App. 35a-37a).

That alternative jurisdictional predicate made no substantive difference in the outcome, however, because the court held that the standard of review to be applied under ERISA § 404 was the same as that which would have been applied under Section 302(c)(5).[14] The court thus analyzed the Fund's past service cancellation rule in light of its own prior constructions of Section 302(c)(5), without regard to this Court's contrary controlling construction of that statute in *Robinson.* Unencumbered by *Robinson*, the court held that the Fund's past service cancellation rules

> are arbitrary and capricious, and have a structural defect in violation of § 302 of the LMRA and § 404 of the ERISA, by reason of [the Fund's] failure to meet its burden of showing a reasonable relationship between the cancellation provisions and the purpose of the fund, i.e., that the provisions were necessary to preserve the financial soundness of the Fund.

App. 46a.

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[14] The court relied for this proposition on this Court's statement in *N.L.R.B. v. Amax Coal Co.*, 453 U.S. at 322, that "ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet."

The broadly interventionist construction of Section 302 (c)(5) upon which the court of appeals relied is, we believe, squarely at odds with *Robinson*. As this Court there recognized, Section 302(c)(5) simply does not constitute a roving commission to the federal courts to redesign employee benefit plans in ways which more nearly fit the courts' own judgments of "reasonableness." Nor, we think, can it plausibly be contended that *Robinson* applies only to challenges to eligibility rules established directly through collective bargaining. The *Robinson* analysis of the scope of Section 302(c)(5) was based principally upon this Court's examination of the intended purpose and explicit terms of that statute. The Court's examination reveals no reason to believe that Congress intended, when it enacted Section 302(c)(5), to subject trustee-determined eligibility requirements to any broader judicial supervision than applies to collectively bargained eligibility requirements.[15]

That this Court did not intend *Robinson* to suggest any such distinction is demonstrated by the Court's summary disposition of the petition for certiorari in *Western Conference of Teamsters Pension Trust Fund v. Music*, —— U.S. ——, 74 L. Ed. 2d 48 (1982). Like this case, and unlike *Robinson*, *Music* involved a challenge to a pension eligibility rule adopted in the first instance not through collective bargaining, but, as is far more typical, by the fund trustees. As it did in this case, the Court of Appeals for the Ninth Circuit had stricken the rule because

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[15] Indeed, it is self-evident that no such attempted distinction would make sense, because, under such a rule, it would be a simple matter for collective bargaining parties routinely to shield trustee-adopted eligibility rules from scrutiny by simply incorporating them by reference into collective bargaining agreements. In fact, for reasons wholly unrelated to the issues present here, it has long been the practice in this Fund to do precisely that. The standard contract language used by IAM local unions and employers who agree to participate in the Fund provides that Employer and Union adopt and agree to be bound by the Fund's Trust Agreement and the plan rules adopted by the Trustees.

[t]he Trust Fund has demonstrated no reasonable justification [for it].

Music v. Western Conference of Teamsters Pension Trust Fund, 660 F.2d 400, 405 (9th Cir. 1981). This Court granted the pension fund's petition for writ of certiorari, summarily vacated the court of appeals' decision, and remanded the case for further consideration in light of *Robinson*. That action was taken while the petition for rehearing in this case was pending, and it was brought to the court's attention. The court nonetheless has construed Section 302(c)(5) here just as it did in *Music*.[16] It purported to do so, moreover, not merely as a matter of construing Section 302(c)(5), but as a matter of construing ERISA § 404 as well.

Despite Congress' evident belief that it had occupied the field of regulation of these funds when it enacted ERISA, the decision below would authorize the federal courts, acting in the name of ERISA enforcement, to impose substantive regulations more stringent than those imposed by Congress, and to require employee benefit funds to prove, to the courts' satisfaction on a case-by-case basis, the actuarial necessity for any benefit eligibility rule which offends the courts' own sense of equity. *Robinson* plainly teaches, we believe, that federal courts have no such authority.

Because of the lower court's evident doubt about the reach of *Robinson*, and because of its reliance upon ERISA § 404 as well as LMRA § 302(c)(5) in reaching the conclusion forbidden by *Robinson*, review and correction by this Court is necessary. Otherwise, federal courts following the lead of the court below will continue to assume broad discretionary power to review presumptively lawful eligibility rules prescribed by the trustees of employee benefit plans, and to impose substantive regula-

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[16] As of this writing, the court of appeals has not acted on the *Music* remand.

tions more stringent than those enacted by Congress in LMRA and ERISA. The decision below thus ignores this Court's admonitions in *Robinson* and impermissibly enlarges the role of the federal courts in the enforcement of ERISA.

II. The Court of Appeals' Holding That ERISA § 404 Authorizes Courts To Impose More Stringent Substantive Standards Of Pension Eligibility Than Are Required By ERISA Raises An Important Question Of Federal Law Which Should Be Resolved By This Court.

In ERISA, Congress expressly authorized the use by pension funds like petitioner of past service cancellation as a legitimate device to protect against the consequences of employer termination. By invalidating that practice here, the court of appeals has substituted its own policy judgment for that of Congress, in contravention not only of the well-established general prohibition against judicial legislation but also of this Court's specific injunction against second-guessing the Congressional policy decisions embodied in ERISA. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510-521 (1981).

Analysis must begin with the proposition, not disputed by the court below, that the minimum vesting standards of ERISA do not require past service to be credited *at all*. ERISA § 203(b) (1) (C) permits disregarding past service altogether,[17] as do the analogous ERISA provisions of the Internal Revenue Code which prescribe identical

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[17] Section 203 of Title I of ERISA, which is captioned "Minimum vesting standards," provides in pertinent part that:

> (b)(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this [minimum vesting standards] section, all of an employee's years of service with the employer or

vesting standards,[18] and the tax regulations adopted thereunder.[19]

It is equally clear, moreover, that multiemployer plans which *elect* to credit such past service, as this Fund has, are permitted to do so conditionally, and may, consistent with the ERISA scheme, forfeit any rights which would otherwise have been attributable to such past service upon the failure of the specified condition.[20]

That Congress specifically intended to permit multiemployer plans to condition the grant of past service credits upon continuation of the employer's participation, as the Fund has done here, is reaffirmed by Congress' enactment of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980) ("MPPAA"). In Section 303 of MPPAA, 94 Stat. 1292, Congress amended the minimum vesting

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> employers maintaining the plan shall be taken into account, ***except that the following may be disregarded***:
>
> *   *   *   *
>
> (C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan, defined by the Secretary of the Treasury.

29 U.S.C. § 1053(b)(1)(C) (emphasis added).

[18] *See* 26 U.S.C. § 411(a)(4)(C).

[19] *See* 26 C.F.R. § 1.411(a)-5, and in particular 26 C.F.R. § 1.411(a)-5(b)(3), and 26 C.F.R. § 1.411(a)-5(b)(3)(ii). Under ERISA § 3002(c), 29 U.S.C. § 1202(c), the Treasury vesting regulations are applicable to both the labor provisions and the tax provisions of ERISA.

[20] Again, the Treasury Regulations leave no doubt on the point:

> To the extent that rights are not required to be nonforfeitable to satisfy the minimum vesting standards, or the nondiscrimination requirements of section 404(a)(4), ***they may be forfeited without regard to the limitations on forfeitability required by this section.***

26 C.F.R. § 1.411(a)-4(a) (emphasis added).

standards provided in Section 203 of Title I of ERISA to specify that

> A right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

29 U.S.C. § 1053(a)(3)(E)(i).[21]

Notwithstanding that its jurisdiction was found in ERISA, the court of appeals did not advert to this elaborate and explicit statutory regulatory scheme at all.[22] The court held, in substance, that the past service cancellation device authorized and approved by Congress may only be used when a pension fund is prepared to "meet its burden of showing . . . that the provisions [are] necessary to preserve the financial soundness of the Fund" (App. 46a).

The legislative judgments embodied in ERISA may not, however, so lightly be displaced. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, the Court held that the states may not legislatively prohibit a pension plan provision which Congress has implicitly authorized. In that case, a statute of the State of New Jersey had prohibited the use of workers' compensation offset provisions in pension plans. In its review of that statute, this Court found that, in enacting ERISA, Congress had expressly

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[21] This provision was not new in 1980, of course. Similar language, originally contained in ERISA § 3(37), 88 Stat. 833 (1974), was deleted from ERISA by MPPAA as superfluous. MPPAA § 302, 94 Stat. 1291-92.

[22] The absence of any such discussion in the court's opinion was one of the grounds advanced in support of the petition for rehearing below, which the court denied.

authorized, although it did not require, the use of similar offsets with respect to Social Security Act and Railroad Retirement Act benefits. The Court found in those two explicit offset provisions a Congressional policy to permit similar offsets with respect to other, similar "income streams," and held that neither the states, acting legislatively, nor the federal courts, were free to substitute their own policy judgments for those of the Congress.

> Our judicial function is not to second-guess the policy decisions of the legislature, no matter how appealing we may find contrary rationales.

Alessi, 451 U.S. at 521.

The proposition that it is not the proper function of the courts to legislate is hardly a novel one.[23] And if the offset provisions which the *Alessi* Court found to have been implicitly sanctioned in ERISA are protected from judicial second-guessing, it follows *a fortiori* that the explicitly authorized past service cancellation devices set aside by the court of appeals must be similarly protected.[24]

If the court below is correct, however, the entire substantive regulatory scheme embodied in ERISA would be fair game for judicial rewriting, notwithstanding these well-settled principles. Any eligibility rule which satisfies or exceeds the statutory standards might nevertheless be challenged by a participant who failed to meet it. On the view of the court of appeals, any fund faced with such a challenge could be required to prove that the standard it had chosen was "necessary" or "reasonable". The

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[23] *See, e.g., Hodel v. Indiana*, 452 U.S. 314, 333 (1981) ("[T]he District Court essentially acted as a superlegislature, passing on the wisdom of congressional policy determinations. In so doing, the court exceeded its proper role."); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) ("[J]udges are not accredited to supersede Congress . . . by embellishing upon the regulatory scheme.").

[24] *See Hepple v. Roberts & Dybdahl, Inc.*, 622 F.2d 962 (8th Cir. 1980).

court's approach flies in the face of established standards of due process,[25] and impermissibly ignores the presumption of validity to which the Congressional judgments evidenced in ERISA are entitled.[26]

We believe it plain that the court of appeals is seriously in error in its assumption that the courts are empowered to revise ERISA as they see fit.

> [F]ederal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.

United States v. Rutherford, 442 U.S. 544, 555 (1979). Having occupied the field of pension plan regulation, Congress should be understood to have left the further development of substantive eligibility standards to collective bargaining, the discretion of plan trustees, and future legislation as needed, without participation by state or federal courts. To guarantee that the detailed substantive regulatory standards set forth in ERISA will be applied uniformly as they are written, and that the courts will not require proof of need for pension fund standards which Congress has explicitly found to be necessary and appropriate, the Fund respectfully urges that the Court grant this petition and, upon review, reverse the decision below.

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[25] *See, e.g., Norwood v. Harrison*, 413 U.S. 455, 471 (1973) ("[N]o one can be required, consistent with due process, to prove the absence of violation of law."); *cf. Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

[26] *Cf. Vance v. Bradley*, 440 U.S. 93, 111 (1979) ("In [a] . . . case of this type . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true . . . ."); *United States v. Gainey*, 380 U.S. 63, 67 (1965) ("[I]n matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.")

CONCLUSION

For all the reasons set forth above, petitioner respectfully requests that a writ of certiorari be issued to review the decision of the court of appeals in this case.

Respectfully submitted,

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February 8, 1983

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APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 78-2538-DWW (Sx)

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

I.A.M. NATIONAL PENSION FUND,
Defendant.

[Filed Sept. 5, 1980]

MEMORANDUM

Madge Elser and Margaret Thomas were employed by Waste King of Los Angeles. Particularly relevant to this case is the period of their employment from January 1, 1969 through January 31, 1975. Both women were refused pension benefits by defendant I.A.M. National Pension Fund (IAM) when they terminated their employment, even though they allegedly met both the age and service requirements for vesting of pension rights. Thomas terminated in August of 1975; Elser in October of 1977. They sued the pension fund seeking injunctive and declaratory relief under § 302(c)(5) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 186(c)(5), and under § 404(a)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1104(a)(1).

The pension fund operates a multi-employer pension plan as defined in ERISA, 29 U.S.C. § 1002. To become participants in the plan, an employer and the local union must both sign a participation agreement. Waste King

joined the plan on January 1, 1969. In Article IV, the plan provides that "past service credit" can be given to employees for periods of their employment prior to the date on which their company began to make contributions to the fund. In order to qualify for a minimum pension benefit, a covered employee must have accumulated at least ten years of credited service; at least one year of that must be "future service credit," that is, accumulated while the employer was making contributions to the fund. Once the employee has accumulated 10 years of service credit, the pension vests, but is not paid until employee fulfills an additional requirement of attaining age 50.

An employee's right to have his pension benefits vest is expressly made subject to Section 4 of Article IX of the plan, which at the time Waste King joined the plan was Article VIII Section 4. It reads in part:

> "In the event that a Contributing Employer ceases to be obligated to make contributions to the Fund at any time after the period ending 48 months after its Contribution Date, and should that Employer or its successor thereafter continue in business, all years of Past Service credit based on employment with such Employer shall be cancelled retroactively, notwithstanding any contrary provisions contained elsewhere in this Plan."

There is an exception to the cancellation of past service credit for employees who are already retired and receiving benefits under the plan at the time the employer ceases making contributions. Also there are "relief provisions," which were later added by amendment to mitigate the harsh consequences of an employer's nonpayment. An employee can, 1) retain his past service credit if he terminates his employment at least 24 months before the employer ceases making contributions or within 30 days after that date, or 2) reinstate his past service

credit if he earns 5 years of future service credit within an 8-year period following the date the agreement was terminated.

In a National Labor Relations Board election held in early 1975, Waste King's employees decertified IAM District Lodge No. 94 as their collective bargaining representative. The collective bargaining agreement between Waste King and IAM was terminated as of January 31, 1975, and Waste King ceased making contributions to the fund. As a result, employees who had not already retired and who did not qualify under one of the "relief provisions" forfeited their past service credit. After forfeiting their past service credit, plaintiffs did not have the required 10 years of continuous service credit, their pension rights did not vest, and they were disqualified from receiving any pension benefits.

Defendant claims that notice of the cancellation provisions was given to Waste King employees in 1970 and again in 1974 by means of pension plan booklets which contained the rules and regulations of the plan. Allegedly, on February 18, 1970, the fund sent 400 copies of the pension booklet to District Lodge No. 94 with the intent that they be distributed to the covered employees. District Lodge No. 94 Business Representative George Rusnak delivered the pension booklets to the personnel department of Waste King and requested that the booklets be distributed to all bargaining unit employees when they received their next payroll checks. Also in July, 1974, the fund allegedly sent each pensioner, covered employee, contributing empyoyer, and IAM union office the 1974 revised edition of the pension booklet.

Plaintiffs claim that the fund did not notify them of the cancellation provision in the plan or of the relief provisions until June 3, 1975, several months after the employees had decertified the union and Waste King had ceased making contributions. By the time a letter of

notice was received from defendant, the 30-day grace period had already passed. By the time plaintiffs learned of the 5-year future service credit relief provision, they had already been unemployed too long to be able to meet this exception. Plaintiffs cannot recall receiving a booklet, pamphlet or other written literature that set forth a description of the plan and the text of the rules and regulations of the plan during the period of February 18, 1970 through February 28, 1975.

Defendant also claims that union representatives advised Waste King employees prior to the decertification vote that some of them might lose their past service credit if the employees decertified the union and Waste King ceased contributing to the fund. In fact a meeting of the membership of the union was held on December 9, 1974. Defendant claims that the union representative Charles Edwards who was also one of the five union trustees of the fund explained to the members in attendance that the employees stood to lose their pension benefits if the union was decertified. Madge Elser's name appears on the roster of members in attendance at the meeting. A second meeting was held on February 26, 1975, two days before the decertification vote. No attendance roster was prepared reflecting the attendance of the employees at that meeting.

Plaintiffs claim that prior to the decertification, they were not notified that the employees in the collective bargaining unit might lose their past service credit. Neither plaintiff remembers attending the union meeting of February 26, 1975.

The successor union to IAM filed unfair labor practice charges with the NLRB alleging that the fund trustees had restrained and coerced Waste King's employees in the exercise of their rights by causing the forfeiture of the employees' vested pension benefits and that the fund and IAM had discriminated against plaintiffs. These charges

were dismissed by the Regional Director and the dismissal was affirmed by the General Counsel.

This case has been submitted on an agreed statement of facts. The court decides this case on the basis of the written briefs of the parties and without benefit of witnesses or oral argument. The issues to be decided and stipulated by the parties are:

1. Whether the IAM Pension Fund violated the LMRA in adopting and applying eligibility rules for pension benefits, which cancelled plaintiffs' past service credit.

2. Whether the IAM Pension Fund violated ERISA in adopting and applying eligibility rules for pension benefits, which cancelled plaintiffs' past service credit.

3. Whether plaintiffs waived any cause of action arising under the adoption and application of the eligibility rules by their voluntary decertification of the IAM as their union.

4. Whether the prevailing party should be awarded attorneys' fees.

The courts have interpreted that they have power to decide whether there are structural violations of § 302(c)(5) of the LMRA, that is, whether the provisions of a pension fund are "for the sole and exclusive benefit of employees." *Burroughs v. Board of Trustees*, 542 F.2d 1128 (9th Cir. 1976); *Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1972); *Roark v. Lewis*, 401 F.2d 425 (D.C. Cir. 1968). Section 302 prohibits any payment by an employer to a representative of its employees except as expressly permitted by that section. Section 302(c)(5) exempts payments of "money or other things of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer . . . ."

In determining whether a retirement plan violates § 302, the Ninth Circuit has articulated three different

and distinct theories upon which liability can be based: 1) the arbitrary and capricious standard; 2) the reasonable notice standard; and 3) the sizeable exclusion/reasonable justification standard. *Lee v. Nesbitt*, supra; *Burroughs v. Board of Trustees*, supra.

This court is of the opinion that the cancellation provision and relief provisions are arbitrary and capricious on their face and as applied to plaintiffs. When plaintiffs' past service credit was cancelled, they no longer had the 10 years of service credit which was one of the requirements for vested pension rights. Plaintiffs' forfeiture stands in marked contrast to those persons who left Waste King's employment between January 31, 1970 and January 31, 1973, prior to the 24-month period. Those persons retained their past service credit. Any of them with the required 10 years of service credit are currently eligible for pension benefits once they reach age 50.

A cursory examination of the plan rules reveals that employees like plaintiffs who worked for Waste King for a longer period of time and on whose behalf Waste King made contributions to the fund for a longer period of time were the ones deprived of pension benefits. On the other hand, employees with 10 years of credit who left Waste King earlier and perhaps took up employment with other employers retained their past service credit and their right to pension benefits. These provisions cancelling past service credit for plaintiffs and not employees who left employment at least 2 years earlier are arbitrary and capricious on their face and as applied to plaintiffs.

Under the reasonable notice standard of review, this court finds that plaintiff Margaret Thomas did not receive proper notice of the cancellation provision and relief provisions. The fund claims that it gave notice of the provisions by sending out booklets to the employers and by having union representatives speak at the union meetings. These methods were inadequate to convey notice to Ms.

Thomas who apparently did not attend the meetings and did not receive a copy of the booklet. The 1974 pension plan booklets were issued almost one year before the union was decertified. Furthermore, sending booklets to the employer does not insure that they will reach the employees. In the June 3, 1975 letter that was sent long after the credits had been forfeited, there was no reference that plaintiffs could still preserve their past service credit if they obtained 5 additional years of future service credit by January of 1981. Mere announcement at union meetings is inadequate because many employees do not attend union meetings. A better kind of notice was that given in *Baltimore Rebuilders, Inc. v. NLRB*, 611 F.2d 1372 (4th Cir. 1979), in which the fund sent letters to each employee informing them of the cancellation provision and relief provisions in detail.

Madge Elser did receive adequate notice of the provisions. She signed the roster taken at the December 9 meeting, and the minutes from that meeting indicate that the union representative informed the members that they stood to lose their pensions if the employees decertified the union. However, the fact that Ms. Elser received adequate notice does not solve the problem that the provisions are arbitrary and capricious. Adequate notice is only one standard of review articulated by the courts.

The application of the cancellation and relief provisions caused a sizeable exclusion of employees from pension benefits without a reasonable justification for this exclusion. It prevented at least 75 employees from obtaining pension benefits although if their past service credit had been counted, their pension rights would have vested as of January 31, 1975. Of course, it is essential that in order for a pension fund of this type to remain actuarially sound, it must have enough funds being paid in to balance out the funds it will be required to pay out as benefits. This means that contributions must be paid in for some persons who never receive any benefits from

the plan. Also the value of past service credit must be amortized over several years and added to the contributions of the employer. But there are other methods of accomplishing this than treating groups of employees unequally, especially when the employees for whom the greatest amount of contributions have been made are the ones who lose their pensions.

The cancellation provision and the relief provisions of the IAM Pension Fund also violate § 404(a)(1) of ERISA. That section provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan . . . ." The standard of review under § 302 of the LMRA, the arbitrary and capricious test, is the same for cases brought under § 404 of ERISA. *Bueneman v. Central States Southeast and Southwest Areas Pension Fund*, 572 F.2d 1208 (8th Cir. 1978).

The trustees of the fund violated § 404(a)(1) because they treated plaintiffs disparately from other employees by cancelling their past service credit. It is true that ERISA permits a multi-employer plan to provide for the cancellation of past service credit upon an employer's cessation of contributions. See § 3(37) of ERISA, 29 U.S.C. § 1002(37). However, § 3(37) does not validate provisions that are otherwise objectionable because they are discriminatorily applied. Also the fact that the cancellation and relief provisions are contained in the plan documents does not meet the standard under ERISA, which requires that the provisions be reasonable under the circumstances.

Defendant contends that despite any fault in the provisions or with the trustees, plaintiffs are estopped to assert the invalidity of the fund provisions because they

voluntarily withdrew from the fund by decertifying the union. This argument is unconvincing. Plaintiffs did not voluntarily decertify the union. See *Norton v. I.A.M. National Pension Fund*, 553 F.2d 1352 (D.C. Cir. 1977); *Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1972).

The NLRB proceedings are irrelevant to a decision in this case. The issues in those proceedings were different from those being addressed in this action under the LMRA and ERISA, and the decision there did not obviate the possibility of violation of other statutes.

Judgment is ordered for the plaintiffs for the nonclass relief asked in the complaint. Plaintiffs shall prepare proposed Findings and a form of Judgment within 10 days.

DATED: September 5th, 1980.

/s/ David W. Williams
DAVID W. WILLIAMS,
United States District Judge

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 78-2538-DWW (Sx)

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

I.A.M. NATIONAL PENSION FUND,
Defendant.

[Filed Nov. 26, 1980]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PRELIMINARY STATEMENT

On June 30, 1978, Plaintiffs MADGE ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated, filed an action in this Court for injunctive and declaratory relief to receive pension benefits pursuant to Section 302(c)(5) of the Labor-Management Relations Act of 1947, as amended (hereinafter referred to for convenience as "the LMRA") and Section 404(a)(1) of the Employee Retirement Income Security Act of 1974 (hereinafter referred to for convenience as "ERISA").

On September 17, 1979, the parties filed a Pre-Trial Order pursuant to this Court's Rules. At paragraph VIII thereof, the parties stipulated that there were no issues of fact to be litigated and that the case was to be submitted to the Court on an agreed stipulation of facts and the subsequent written briefs of the parties.

Additionally, at paragraph X of the same Pre-Trial Order, the parties stipulated that the determination of the class action status of this proceeding would be delayed until after the Court rendered its decision on the merits.

On September 5, 1980, the Court filed its Memorandum in this matter ordering judgment for the Plaintiffs for the non-class relief sought in the Complaint. On October 1, 1980, pursuant to the Court's permission, the Plaintiffs filed a Motion for Class Action Certification in this matter. The Defendant did not oppose this case proceeding as a class action but objected to the Plaintiffs' definition of the proposed class.

On October 30, 1980, this Court filed its Order granting class certification in this proceeding pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure and certified the class as follows:

> "(1) All employees of Waste King who left their employment between January 31, 1973 and January 31, 1975, with at least ten years of continuous service with Waste King and who did not retire during that time; and
>
> (2) All employees of Waste King with at least ten years of continuous service as of January 31, 1975, who were still employed by Waste King as of March 1, 1975."

There are approximately seventy-five (75) class members, ten (10) in Sub-Class No. 1 and sixty-five (65) in Sub-Class No. 2.

FINDINGS OF FACT

I.

Plaintiffs MADGE ELSER and MARGARET E. THOMAS and the class they represent were employed by Waste King at its Los Angeles, California facility for at least ten (10) consecutive years as of January 31, 1973 and/or January 31, 1975 and did not retire from Waste King prior to March 1, 1975.

II.

Defendant is a jointly administered multi-employer pension plan structured in accordance with the requirements promulgated by Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5) and as defined in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1002.

III.

This Court has jurisdiction over this matter pursuant to Sections 502(a)(1)(B) and 502(e)(1) and (2) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1132(a)(1)(B) and 1132(e)(1) and (2) and § 302(e) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 186(e).

IV.

Defendant Fund was established to provide retirement benefits for employees for whom contributions are made under the terms of collective bargaining agreements. From 1969 through January 31, 1975, Waste King was signatory to a collective bargaining agreement with Machinists District Lodge No. 94 and Local Lodge No. 1571 covering the terms and conditions of employment of all production and maintenance employees employed by Waste King, including Plaintiffs Elser and Thomas and the class they represent.

V.

From January 1, 1969 through January 31, 1975, Waste King made pension benefit contributions on behalf of all of its production and maintenance employees, including Plaintiffs Elser and Thomas and the class they represent, to the Fund which totaled $423,728.00.

VI.

The last collective bargaining agreement between Waste King and the Machinists Unions expired on January 31, 1975 and that was the last date Waste King made pension contributions to the Defendant Fund on behalf of its production and maintenance employees.

VII.

On February 28, 1975, in an election conducted by the National Labor Relations Board, the production and maintenance employees of Waste King decertified the Machinists Unions as their collective bargaining representatives.

VIII.

All of the individuals in Sub-Class No. 1 did not vote in the aforementioned decertification election because they were not employed by Waste King at the time of the election. Plaintiffs Elser and Thomas and the class they represent in Sub-Class No. 2 did not voluntarily decertify the Machinists Unions * * *.†

IX.

Plaintiff Thomas terminated her employment with Waste King in a bargaining-unit capacity in August of 1975 and Plaintiff Elser did the same thing in October of 1977. Immediately after both named Plaintiffs terminated their employment with Waste King in a bargain-

† [Editor's Note: The district court crossed out certain portions of plaintiffs' proposed findings of fact and conclusions of law and then entered them as its own. "* * *" indicates where such deletions were made.]

ing-unit capacity, they contacted the Defendant Fund regarding their pension eligibility. Upon doing so, Defendant Fund informed them that they were not entitled to a pension because they did not meet the minimum eligibility requirements of ten (10) years of Credited Service.

X.

The class Plaintiffs Elser and Thomas represent were told and/or would have been told the same thing by Defendant Fund when and/or if the class applied for a pension when they and/or would have terminated their employment with Waste King in a bargaining-unit capacity.

XI.

On October 14, 1975, Teamsters Union Local 986 filed an unfair labor practice charge with the National Labor Relations Board against Defendant Fund's Trustees and the Machinists Unions contending that the decision to cancel the past service credit of Plaintiffs Elser and Thomas and the class they represent because the production and maintenance employees of Waste King voted to decertify the Machinists Unions was an unfair labor practice which restrained and/or coerced said employees in the exercise of Union activities. The Teamsters Union contended that such conduct unlawfully discouraged employees from voting to decertify the Machinists Unions and unlawfully discriminated against them if they subsequently did. The National Labor Relations Board eventually dismissed the aforementioned unfair labor practice charge because the statute of limitations had elapsed. The aforementioned National Labor Relations Board proceedings are irrelevant in the instant proceeding because the National Labor Relations Board addressed different issues concerning interpretations of different statutes than what is before the Court in the instant proceeding.

XII.

In Article IV of the Pension Plan, it provides that "past service credit" can be given to employees for pe-

riods of their employment prior to the date on which their company began to make contributions to the Fund. In order to qualify for a minimum pension benefit, a covered employee must have accumulated at least ten (10) years of credited service, one (1) year of which must be "future service credit," which is credit accumulated while the employer was making contributions to the Fund. Once the employee has accumulated ten (10) years of service credit which is the combination of past and future service, the pension vests, but is not paid until the employee reaches at least age 50.

XIII.

As of January 31, 1975, Plaintiffs Elser and Thomas and the class they represent were vested for pension purposes.

XIV.

The Plan also expressly states that an employee's right to a vested pension benefit is expressly made subject to Section 4 of Article IX of the Plan, which at the time Waste King joined the Plan was Article VIII, Section 4. It reads in part:

> "In the event the Contributing Employer ceases to be obligated to make contributions to the Fund at any time after the period ending 48 months after its Contribution Date, and should that Employer or its successor thereafter continue in business, all years of Past Service Credit based on employment with such Employer shall be cancelled retroactively, notwithstanding any contrary provisions contained elsewhere in this Plan."

XV.

There is an exception to the cancellation of past service credit for employees who are already retired and re-

ceiving benefits under the Plan at the time the employer ceases making contributions. There are also "relief provisions" which were added by amendment, to afford an employee the opportunity to retain his past service credit if he terminates his employment at least twenty-four (24) months before the employer ceases making contributions or within thirty (30) days after that date, or said employee can reinstate his past service credit if he earns five (5) years of future service credit within an eight (8) year period following the date the agreement was terminated.

XVI.

Waste King continued in business subsequent to the decertification of the Machinists Unions on February 28, 1975.

XVII.

Neither Plaintiffs Elser nor Thomas, nor anyone in the class they represent, terminated their employment with Waste King in a bargaining-unit capacity within thirty (30) days after January 31, 1975, the date Waste King ceased making contributions to the Fund.

XVIII.

Neither Plaintiffs Elser nor Thomas reinstated their past service credit subsequent to January 31, 1975 by earning five (5) years of future service credit on or before January 31, 1983.

XIX.

Subsequent to January 31, 1975, Defendant Fund did not initiate any correspondence directly to Plaintiffs Elser and Thomas and/or to the class they represent informing them that their past service credit had been cancelled and/or that they would reinstate their past service credit if they earned at least five (5) years of future service credit on or before January 31, 1983.

XX.

As a result of Waste King ceasing to make contributions to the Fund as of January 31, 1975 and the subsequent decertification of the Machinists Unions on February 28, 1975, Defendant Fund * * * Plaintiffs Elser's and Thomas' and the class they represent, past service credit. By failing to * * * such past service credit, Plaintiffs Elser and Thomas and the class they represent did not have the required ten (10) years of * * * service credit, no longer possessed vested pension rights, and were disqualified from receiving any pension benefits.

XXI.

The cancellation and relief provisions the Defendant Fund applied in the instant proceeding which effectively deprived Plaintiffs Elser and Thomas and the class they represent of a vested pension are arbitrary and capricious on their face and as applied to the Plaintiffs and the class they represent.

XXII.

Cancelling past service credit for employees like Plaintiffs Elser and Thomas and the class they represent who worked for Waste King for a longer period of time and on whose behalf Waste King made contributions to the Fund for a longer period of time in comparison to those employees who left Waste King's employment earlier and who retained their past service credit and their right to pension benefits was arbitrary and capricious.

XXIII.

On February 18, 1970, Defendant Fund sent copies to the then-existing pension booklet to Waste King with the intent that they be distributed to the covered employees. This was inadequate to convey to the employees reasonable notice of the cancellation and relief provisions that were in effect on January 31, 1975 because * * * sending

them to Waste King did not reasonably insure that they would reach Plaintiffs Elser and Thomas and the class they represent.

XXIV.

In July of 1974, approximately seven (7) months before the decertification election, Defendant Fund sent each pensioner, covered employee, contributing employer and I.A.M. Union office the 1974 revised edition of the pension booklet * * *.

XXV.

Neither Plaintiffs Elser nor Thomas recall receiving a booklet, pamphlet, or other written literature which set forth a description of the Plan and/or its rules and regulations prior to June of 1975, several months after the decertification election and Waste King had ceased making contributions to Defendant Fund.

XXVI.

* * * since Plaintiffs Elser and Thomas did not receive a copy of that booklet, the Defendant Fund's efforts in this regard were inadequate to convey reasonable notice of the cancellation and relief provisions that were in effect and applied by the Fund in February of 1975.

XXVII.

On December 9, 1974, a meeting was held of the membership of Machinists Local Lodge No. 1571 for the purpose of discussing the upcoming decertification election. At that meeting, which was attended by sixty-seven (67) members of the bargaining-unit, including Plaintiff Madge Elser, as reflected by the signatures of those who attended, the employees were told that if the decertification election was successful, the bargaining-unit employees stood to lose all pension benefits. Plaintiff Elser does not recall attending this Union meeting. Plaintiff

Thomas, whose name does not appear on the signature roster, also does not recall attending this meeting.

XXVIII.

Neither Plaintiffs Elser nor Thomas recall being notified by the Machinists Union and/or Defendant Fund that they might lose their past service credit if the Machinists Unions were decertified until on or after June 3, 1975.

XXIX.

Although Plaintiff Elser does not recall attending the December 9, 1974 Union meeting, her attendance at such, as reflected on the signed roster of those in attendance, constituted adequate notice of the relief and cancellation provisions. This is also true of the other class members who were in attendance at the Union meeting.

XXX.

A second Union meeting for the Waste King bargaining-unit employees was held on February 26, 1975. No attendance roster was prepared reflecting the attendance of those bargaining-unit employees who attended this meeting and neither Plaintiffs Elser nor Thomas recall attending this Union meeting.

XXXI.

Plaintiff Thomas did not receive reasonable and proper notice of the cancellation and relief provisions. In this respect, Plaintiff Thomas and those members of the class similarly situated were not given a reasonable opportunity to protect and insulate themselves from the impact of the Fund's application of the cancellation and relief provisions since Thomas did not attend either Union meeting and first became aware of the cancellation and relief provisions subsequent to June 3, 1975, when Defendant Fund sent Waste King a letter reflect-

ing that said employees' past service credit had been forfeited. Significantly, said written correspondence made no mention of the fact that said employees could restore their past service credit if they accumulated five (5) additional years of future service on or before January 31, 1983.

XXXII.

Unlike the notification sent by Defendant Fund in *Baltimore Rebuilders, Inc. v. N.L.R.B.*, 611 F.2d 1372 (4th Cir. 1979), in which the Defendant Fund sent letters to each employee informing them of the cancellation provision and relief provisions in detail, the Defendant Fund did not afford Plaintiff Thomas and those class members similarly situated a similar form of reasonable notice.

XXXIII.

The Defendant Fund's application of the cancellation and relief provisions in the instant proceeding caused a sizeable number of employees (approximately 75) from receiving pension benefits without a reasonable justification existing for the exclusion.

XXXIV.

Prior to implementing the cancellation and relief provisions, Defendant Fund did not calculate whether an unfunded liability existed for Waste King as of January 31, 1975 * * *.

* * * *

XXXVI.

Obviously, actuarial solvency is a critical determination but there were better ways the Fund could have accomplished this in the instant proceeding if indeed the Fund was faced with an unfunded liability resulting from Waste King's termination of participation in the Fund.

XXXVII.

The Defendant's implementation of the cancellation and relief provisions in the instant proceeding was not engaged in solely in the interest of the participants and beneficiaries of the Plan.

XXXVIII.

Section 3(37) of ERISA, 29 U.S.C. § 1002(37), does expressly state that a multi-employer plan can provide for the cancellation of past service credit upon an employer's cessation of contributions but that statutory provision does not validate provisions that are incorporated and written into the trust documents which are either objectionable, unreasonable, and/or discriminatorily applied when examined in light of a particular factual situation such as in the instant proceeding.

XXXIX.

The Defendant Fund's actions in the instant proceeding in implementing the cancellation and relief provisions which effectively abolished a vested pension for approximately seventy-five (75) employees, who otherwise would have been entitled to such, was unlawful and is hereby declared null and void.

XXXX.

Defendant Fund is hereby preliminarily and permanently enjoined from calculating service credit for pension purposes as to Plaintiffs Elser and Thomas and the class they represent without referring to and applying said employees' past service credit.

XXXXI.

Those individuals in Sub-Class No. 1, who left the employment of Waste King in a bargaining-unit capacity between January 31, 1973 and January 31, 1975 with at

least ten (10) years of continuous service with Waste King and who did not retire during that time, shall be entitled to a retroactive pension from the date they first wrote and/or write to the Defendant Fund concerning their pension eligibility status, at seven (7%) percent interest per annum if said written correspondence took place prior to the date of this judgment, up to and including the present and subsequent hereto, provided, however, said individuals meet and fully comply with the other rules and regulations established by Defendant Fund not declared invalid and/or unlawful herein.

XXXXII.

Those individuals in Sub-Class No. 2, who are currently working for Waste King in a bargaining-unit capacity, shall be entitled to a pension upon leaving the employment of Waste King in a bargaining-unit capacity and applying for such with Defendant Fund, provided, however, said individuals meet and fully comply with the other rules and regulations established by Defendant Fund not declared invalid and/or unlawful herein.

XXXXIII.

Those individuals in Sub-Class No. 2, who are not currently working for Waste King in a bargaining-unit capacity, including Plaintiffs Elser and Thomas, shall be entitled to a retroactive pension at seven (7%) percent interest per annum from the date they left the employment of Waste King in a bargaining-unit capacity up to and including the present and subsequent hereto, provided, however, said individuals meet and fully comply with the other rules and regulations established by Defendant Fund not declared invalid and/or unlawful herein.

XXXXIV.

The Plaintiffs herein shall be awarded from Defendant Fund the actual costs of suit incurred herein including

reasonable attorneys' fees to counsel of record, the amount of which is to be determined by the Court upon application if the parties herein are unable to agree upon an amount.

CONCLUSIONS OF LAW

The Findings of Fact * * * incorporated herein by this reference as Conclusions of Law.

I.

Defendant Fund violated the LMRA in adopting and applying eligibility rules for pension benefits which cancelled Plaintiff Elser's and Thomas' and the class they represent past service credit.

II.

In doing so, a structural violation of Section 302(c)(5) of the LMRA took place because the adoption and application of said rules were not for the sole and exclusive benefit of the employees.

III.

In determining whether retirement plans violate Section 302 of the LMRA, the Ninth Circuit has articulated three different and distinct theories upon which liability can be based: (1) the arbitrary and capricious standard; (2) the reasonable notice standard; and (3) the sizeable exclusion/reasonable justification standard. *See Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1972) and *Burroughs v. Board of Trustees*, 542 F.2d 1128 (9th Cir. 1978).

IV.

The Defendant's adoption and application of the cancellation and relief provisions in the instant proceeding violated * * * of the above-mentioned standards.

* * * *

X.

The Fund violated Section 404(a)(1) of ERISA because it treated Plaintiffs Elser and Thomas and the class they represent disparately from other employees in cancelling their past service credit.

XI.

Judgment shall be ordered herein for Plaintiffs Elser and Thomas and the class they represent as articulated hereinabove.

DATED: ——————

DAVID W. WILLIAMS
United States District Court Judge

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Attorneys for the Plaintiffs

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 78-2538-DWW (Sx)

MADGE ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

I.A.M. NATIONAL PENSION FUND,
Defendant.

[Filed Nov. 26, 1980]

JUDGMENT

This matter having been tried before the Court on the basis of an agreed statement of facts and the written briefs of the parties and the Court having considered such,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Plaintiffs MADGE ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated, in the above-captioned matter in accordance with the Findings of Fact and Conclusions of Law filed simultaneously herewith.

DATED: ——————

DAVID W. WILLIAMS
United States District Court Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 78-2538-DWW (Sx)

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Appellees and Cross-Appellants,

vs.

I.A.M. NATIONAL PENSION FUND,
Appellant and Cross-Appellee.

[Filed Apr. 16, 1981]

AMENDMENTS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

I-A

The N.L.R.B. proceedings are irrelevant to the Court's determination in this proceeding because the issues and statutes being addressed in this action are different from those that confronted the National Labor Relations Board.

II-A

The plaintiffs, and the class they represent did not waive any statutory rights by their conduct in the February 28, 1975 decertification election.

III-A

The standard of judicial review under Section 302 (c)(5) of the LMRA is the same for actions brought under Section 404 of ERISA.

IV-A

Section 3(37) of ERISA does not validate provisions contained in plan documents that are otherwise objectionable and/or unreasonable.

V-A

The cancellation and relief provisions violate Section 404(a)(1) of ERISA because the adoption and application of such by the defendant were not done solely in the interest of the participants and beneficiaries of the Plan and defraying reasonable expenses of administering the plan.

DATED: This 16th day of April, 1981.

/s/ David W. Williams
DAVID W. WILLIAMS
United States District Court Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 80-6095, 81-5024

D.C. No. CV 78-2538-DWW (Sx)

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees and Cross-Appellants,

v.

I.A.M. NATIONAL PENSION FUND,
Defendant-Appellant and Cross-Appellee.

[Filed Aug. 20, 1982]

Appeal and Cross-Appeal from the United States District Court for the Central District of California

David W. Williams, District Judge, Presiding

Argued and Submitted March 10, 1982

Decided

Before: HAYNSWORTH* and CHOY, Circuit Judges and JAMESON,** District Judge.

OPINION

JAMESON, District Judge:

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* The Honorable Clement F. Haynsworth, Jr., Senior Circuit Judge, United States Court of Appeals, Fourth Circuit, sitting by designation.

** The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

Defendant-appellant, I.A.M. National Pension Fund, has appealed from a judgment holding that the Fund's cancellation provisions are arbitrary and capricious and that plaintiffs-appellees, Madge H. Elser and Margaret C. Thomas, and others similarly situated, were improperly denied pensions.

I. *Factual Background*

The Fund operates a multiemployer pension plan structured in accordance with the requirements of Section 302(c)(5) of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 186(c)(5), and as defined in Section 3(37) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(37). The plan was created in 1960 by the International Association of Machinists and Aerospace Workers (I.A.M.) and several employers of I.A.M. represented employees. The plan is administered by trustees designated by the international union and participating employers. Each participating employer and local union has agreed to comply with terms established in their collective bargaining agreements and in the trust agreement under which the plan was created and operates.

The plan provides that employees must have at least ten years of "credited service" to qualify for pension benefits. "Credited service" is comprised of both "past service credit" (i.e. credit for periods of eligible employment prior to an employer's initial contribution) and "future service credit" (credit for periods of covered employment for which contributions were actually made).[1] Although the pension "vests" when an employee accumulates ten years of credited service, pension payments do not begin until the employee attains age fifty.

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[1] The crediting of past service is common in multiemployer plans. This feature allows employees who are near retirement age when their employer first contributes to the plan to be eligible for benefits calculated on the basis of all their years of employment, after as little as one year's contributions have been made.

Waste King, former employer of Elser and Thomas, began contributing to the pension plan on January 1, 1969, pursuant to its 1968 collective bargaining agreement with I.A.M. District Lodge No. 94. In December of 1974, approximately fifty of Waste King's employees met to consider decertifying the I.A.M. union. The collective bargaining agreement between Waste King and the union expired January 31, 1975, at which time Waste King ceased contributing to the plan. On February 26, 1975, the employees met again to consider decertification. Two days later the union lost a decertification election.

Elser and Thomas were both employed by Waste King for at least ten consecutive years. As a result of Waste King's withdrawal from the plan on January 31, 1975, both appellees had only six years of future service credit. The remainder of their ten years service was past service credit.

When Waste King withdrew from the Fund in 1975, Article IX, Section 4 of the plan provided for retroactive cancellation of all past service credit should an employer cease making contributions to the Fund and remain in business. Excluded from this cancellation were those employees who were already receiving pensions or who had left their employment more than 24 months before or within 30 days after their employer's termination of participation. The plan also allowed the reinstatement of past service credit if the covered employee earned at least five more years of future service credit within eight years of his employer's termination of participation.[2]

[2] These provisions were included in an amendment to the plan in 1973. The cancellation provisions had undergone several revisions since Waste King joined in the plan in 1969. Originally the plan excluded from cancellation only those plan participants who were already receiving pensions and those who had left their employment more than 24 months prior to their employer's termination of participation.

In December of 1974, the Fund restored its former practice of cancelling only past credited service by repealing the 1973 amend-

The Fund had atempted to give employees notice of these provisions through pension booklets, union meetings and the I.A.M. newspaper.[3]

On June 3, 1975, the Fund notified Waste King and the union by letter that pursuant to Article IX, Section 4, all past service credit accumulated by plan participants who had not left the employment of Waste King over 24 months before or 30 days after January 31, 1975 had been cancelled. This letter, which was not mailed to the plan participants, did not mention that past service credit could be restored by accumulating five additional years of future service credit within eight years or indi-

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ment which required cancellation of future credited service upon an employer's termination of participation.

[3] In 1970, the Fund sent copies of its pension booklet, which contained the rules and regulations of the plan, to I.A.M. District Lodge No. 94, which in turn delivered them to Waste King's payroll office for distribution to the company's covered employees. In July, 1974, the Fund sent to each contributing employer, I.A.M. union office and each covered employee at his home address the 1974 revised edition of the pension booklet. Neither Elser nor Thomas recall receiving the booklet. In January, 1975, the I.A.M. newspaper printed a special report on the I.A.M. National Pension Fund which specifically referred to the Article IX cancellation provisions. The newspaper was mailed to all union members at their last known address.

The subject of pension forfeiture was discussed at two meetings conducted by the local I.A.M. union called for the purpose of discussing the upcoming decertification election. The union's notes of the first meeting, held on December 9, 1974, indicate that in discussing the subject of pension eligibility, the union "[b]rought up the fact that on the pension, if the *decert* [author's emphasis] did go through, the employees *would be considered short term employees and would stand to lose all pension benefits.*" [Emphasis added.] Elser is shown on the union's roster as attending the meeting, but she does not recall being present. Thomas did not attend. Although the pension plan was discussed a second time at a February 26, 1975 union meeting, the record does not reflect whether any of the appellees attended or to what extent the cancellation provisions were discussed.

cate that minimum service requirements could be met by obtaining future service credit from a different contributing employer. No plan participant avoided the forfeiture of past service credit by leaving the employment of Waste King during the 30 day grace period provided by the Fund.[4]

Thomas terminated her employment with Waste King in August 1975 and applied for a pension shortly thereafter. As a result of the cancellation of her past service credit she did not have ten years credited service and her application was denied. Elser terminated employment in October 1977 and was subsequently denied a pension for the same reason.

II. *Proceedings in District Court*

In June, 1978 Elser and Thomas brought this action for injunctive and declaratory relief pursuant to § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5) and § 404(a)(1) of the ERISA, 29 U.S.C. § 1104(a)(1). They sought, inter alia, a judgment declaring that the cancellation of past service credit was unlawful, and therefore null and void, and "establishing plaintiffs' and the class they represent, eligibility for a pension under the Plan and stating the number of years of credited service to which said employees are entitled." The Fund's answer denied that the cancellation was unlawful and alleged that the plaintiffs were barred by waiver and estoppel, because they had voluntarily decertified the union with full knowledge of the consequences to their pension plan eligibility.

The case was submitted on stipulated facts. In a memorandum decision entered on September 5, 1980 the court found that the cancellation provisions were "arbitrary

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[4] At least nine persons who retired from Waste King before January 31, 1975 (and whose 10 years' service was necessarily based in part on past credit) continued to receive pension payments.

and capricious on their face and as applied to plaintiffs," and, as such, violative of both the LMRA and the ERISA. With respect to Thomas, the court found, as an alternative ground for relief that Thomas had not received adequate notice of the operation of the cancellation provisions. The court rejected the Fund's estoppel defense, since the plaintiffs "did not voluntarily decertify the union." [5]

On October 29, 1980, the court certified the proposed class of approximately 75 plaintiffs in two subclasses. Subclass No. 1 include nonretired employees who left Waste King employment before January 31, 1975 (the termination date of Waste King's contributions, but within 24 months before decertification and withdrawal. Subclass No. 2 includes persons employed by Waste King at the time of decertification and withdrawal. All members of the subclasses had at least ten years of continuous employment with Waste King.

In Findings of Fact and Conclusions of Law filed November 26, 1980, the court enjoined the Fund from removing past service credit in calculating plaintiffs' pension eligibility, and awarded retroactive pension benefits, interest, costs and attorney fees. A formal judgment was entered "in accordance with the Findings of Fact and Conclusions of Law". The Fund appealed from the judgment entered in favor of the plaintiff. Elser cross-appealed from the finding of adequate notice.

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[5] Following the June 3, 1975 letter from the Fund to Waste King the successor union had filed unfair labor practice charges, which were denied by the Regional Director, and the dismissal was affirmed by the General Counsel. Again in 1978, after denial of Elser's individual pension applications, the successor union filed another unfair labor practice charge. The Regional Director refused to issue a complaint, and the General Counsel affirmed. In its memorandum decision the court concluded that the NLRB proceedings were irrelevant since the issues in those proceedings were different from those addressed in this action.

III. *Issues on Appeal*

The issues presented on appeal are (1) whether the plaintiffs waived their claim to past service credit through decertification of the union; (2) whether the Fund's rules for cancelling past service credit were arbitrary and capricious under LMRA § 302 (29 U.S.C. § 186) and ERISA § 404 (29 U.S.C. § 1104); and (3) whether the Fund gave the plaintiffs adequate notice of the cancellation provisions.

IV. *Jurisdiction*

Section 302 of the LMRA, 29 U.S.C. § 186, makes it "unlawful for any employer or association of employers" to pay any money or other thing of value to employee representatives. Section 302(c)(5) creates an exception for employee pension funds, stating that the provisions of Section 302 are not applicable

> with respect to money or other thing of value paid to a trust fund established by such representative, *for the sole and exclusive benefit of the employees of such employer, and their families and dependents* (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents. . . .

29 U.S.C. § 186(c)(5) (emphasis added). Section 302(e), 29 U.S.C. § 186(e), provides that federal district courts have jurisdiction "to restrain violations of this section."

This court has consistently recognized that § 302(e) "grants district courts jurisdiction to determine whether the provisions of a given retirement fund constitute a structural defect in violation of § 302(c)(5)," but does not "confer general power to interfere with provisions of agreements freely entered into between unions and employers which regulate day-to-day administrative mat-

ters of pension coverage and eligibility." *Burroughs* v. *Board of Trustees & Pension Trust, etc.*, 542 F.2d 1128, 1130 (9 Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977). See also *Alvares* v. *Erickson*, 514 F.2d 156, 165 (9 Cir.) *cert. denied* 423 U.S. 874 (1975); *Wilson* v. *Board of Trustees, etc.*, 564 F.2d 1299, 1300 (9 Cir. 1977); *Ponce* v. *Construction Laborers Pension Trust*, 628 F.2d 537, 541 (9 Cir. 1980). A "structural" defect is present when "pension trustees, acting under the authority of the trust fund 'arbitrarily and capriciously' den[y] pensions to employees." *Ponce*, 628 F.2d at 541. "Such arbitrary and capricious conduct is deemed not to be 'for the sole and exclusive benefit of the employees,' and is therefore structurally deficient." *Id.* at 541-42. See also *Tomlin* v. *Board of Trustees*, 586 F.2d 148, 149 (9 Cir. 1978); *Burroughs*, 542 F.2d at 1131.

In the recent case of *United Mine Workers, etc.* v. *Robinson*, —— U.S. ——, 102 S.Ct. 1226 (1982), the Supreme Court made it clear that the "sole and exclusive benefit" provision of § 302(c)(5) embodies no "reasonableness requirement" and that its "plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents to the exclusion of all others." *Id.* at 1231.[6]

Robinson involved a collective bargaining agreement where the eligibility requirements and benefit levels were fixed by the agreement. The Court recognized a distinction between *Robinson* and those cases in which the

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[6] In *Robinson*, the Court of Appeals for the District of Columbia Circuit had invalidated the provisions of a collective bargaining agreement allocating health benefits among potential beneficiaries of an employee benefit trust fund. In reversing, the Supreme Court held that pension fund trustees are obligated to enforce the eligibility requirements fixed by the collective bargaining agreement unless modification is required to comply with applicable federal law. *Id.* at 1233.

eligibility rules and benefit levels are fixed by trustees of the fund. The Court said in part:

> The Court of Appeals has held in those cases "that the Trustees have 'full authority . . . with respect to questions of coverage and eligibility' and that the court's role is limited to ascertaining whether the Trustees' broad discretion has been abused by the adoption of arbitrary or capricious standards." *Pete* v. *United Mine Workers of America Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1283 (CADC 1975) (en banc). Noting that "[t]he institutional arrangements creating this Fund and specifying the purposes to which it is to be devoted are cast expressly in fiduciary form," the court stated that "the Trustees, like all fiduciaries, are subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run." *Kosty* v. *Lewis*, 319 F.2d 744, 747 (CADC 1963), cert. denied, 375 U.S. 964, 84 S.Ct. 482, 11 L.Ed.2d 414.

Id. at 1233.

Concluding that these cases provided no support for the Court of Appeals' holding that eligibility rules fixed by a collective bargaining agreement must meet a reasonableness standard, the Court noted that

> In *NLRB* v. *Amax Coal Co.*, —— U.S. ——, ——, 101 S.Ct. 2789, 2794, 69 L.Ed.2d 672, the Court held that in enacting § 302(c)(5) "Congress intended to impose on trustees traditional fiduciary duties." The Court did not decide, nor do we decide today, whether federal courts sitting as courts of equity are authorized to enforce those duties. It is, of course, clear that compliance with the specific standards of § 302(c)(5) in the administration of welfare funds is enforceable in federal district courts

> under § 302(e) of the LMRA. See *Arroyo* v. *United States*, 359 U.S. 419, 426-427, 79 S.Ct. 864, 868-869, 3 L.Ed.2d 915.

Id. at 1233, n. 12.

This court need not decide whether federal courts are authorized to enforce the fiduciary duties imposed on trustees by § 302(c)(5). The *Robinson* Court held that the "substantive terms of jointly administered employee benefit plans must comply with the detailed and comprehensive terms of the ERISA." *Id.* at 1234. "ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet." *N.L.R.B.* v. *Amax Coal Co.*, 453 U.S. 322, 332 (1981). The fiduciary duties provisions of the ERISA, § 404, 29 U.S.C. § 1104,[7] became effective January 1, 1975, 29 U.S.C. § 1114(a), and are applicable to the trustees' actions in this case. This court therefore has jurisdiction pursuant to 29 U.S.C. § 1132(f).

V. *Standard of Review*

The trustees of a pension plan "have broad discretion in setting eligibility rules. A court should interfere only when the rule is unreasonable or its enforcement arbitrary." *Giler* v. *Board of Trustees*, 509 F.2d 848, 849 (9 Cir. 1975); *Sailer* v. *Retirement Fund Trust*, 599 F.2d 913, 914 (9 Cir. 1979). Because of the trustees' presumed expertise and familiarity with the fund, "[i]t is for the trustees, not judges, to choose between various reasonable alternatives." *Ponce*, 628 F.2d at 542, quoting from *Roark* v. *Lewis*, 401 F.2d 425, 429 (D.C. Cir. 1968). See also *Tomlin*, 586 F.2d at 151; *Wilson*, 564 F.2d at 1302.

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[7] § 404(a)(1) provides that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and (A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan. . . ."

The actions of trustees are subject to the same standard of review under the ERISA's fiduciary provisions as they are under the LMRA. *Gordon* v. *ILWU-PMA Benefit Funds*, 616 F.2d 433, 438 (9 Cir. 1980).[8] Therefore the decisions of the trustees "may be reversed only where they are arbitrary, capricious or made in bad faith, not supported by substantial evidence, or erroneous on a question of law." *Rehmar* v. *Smith*, 555 F.2d 1362, 1371 (9 Cir. 1976).[9] See also *Aitken* v. *IP & GCU-Employer Retirement Fund*, 604 F.2d 1261, 1264 (9 Cir. 1979).[10]

VI. *Waiver by Decertification*

In contending that appellees' claims should be barred "by the doctrines of waiver and estoppel," appellant argues that since the appellees "voluntarily"[11] chose to decertify the union, which led to a cancellation of past service credit, they "should not be heard to argue now" that the cancellation of past service credit was "arbitrary and capricious". In contending that the decertification election was an "involuntary" forfeiture of past service

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[8] See also *Fentron Industries* v. *Nat. Shopmen Pension Fund*, 674 F.2d 1300 (9 Cir. 1982). As the court noted in *Gordon*, 616 F.2d at 437, and *Fentron Industries*, 674 F.2d at 1307, Congress designed ERISA to promote pension plans and to protect their beneficiaries.

[9] *Rehmar* adopted the standard of review established in *Danti* v. *Lewis*, 312 F.2d 345, 348 (D.C. Cir. 1962), and *Kosty*, 319 F.2d at 747, which was referred to in *Robinson*.

[10] This court has also recognized a related standard for determining whether a pension plan is structurally deficient, i.e., the "sizeable exclusion/reasonable justification" standard. See *Burroughs* v. *Board of Trustees of Pension Trust, etc., supra; Souza* v. *Trustees of Western Conference*, 460 F. Supp. 483 (N.D. Cal. 1978).

[11] The fund bases its argument on the voluntary/involuntary test applied to the "break-in-service" eligibility rules considered in *Lee* v. *Nesbitt*, 453 F.2d 1309 (9 Cir. 1972); *Giler*, 509 F.2d at 849; and *Wilson*, 564 F.2d at 1301.

credit, appellees point out that the members of subclass No. 1 did not even vote in the decertification election and that subclass No. 2 constituted "but a small fraction" of those who actually voted because all members of the bargaining unit were eligible to vote. The appellees argue, therefore, that their vote was outweighed by that of the non-plaintiff employees who did not stand to lose a vested pension right by voting against the union.

In response the Fund argues that although subclass No. 1 members did not vote, they "should be deemed to have participated in the overall process of decertification, and to have contributed to its result by terminating their employment within the 24 month period preceding the vote, thereby weakening the anti-decertification constituency." As to subclass No. 2, the Fund argues that if the class members were truly members of a "dissenting minority" who were unwilling to give up their pension benefits, they could have exercised their option to terminate employment within 30 days of Waste King's withdrawal from the Fund.

We agree with the district court that the Fund's argument is "unconvincing". There is of course no evidence as to how the class members and other employees voted. The decertification election can hardly be considered a "voluntary" forfeiture of benefits when those who stand to lose the most from decertification are but a small segment of a larger group voting on decertification. The Fund argues that this case is "substantially equivalent" to *Giler*, *supra.* Giler, however, involved a "break-in-service" provision, and "Giler voluntarily left covered employment." We find *Giler* and the other cases cited by appellant distinguishable.

The district court properly found that members of subclass No. 1 simply did not vote in the decertification election, and that members of subclass No. 2 "did not

voluntarily decertify the Machinists Unions." [12] We agree with the district court that appellees' claims are not barred by waiver or estoppel.

VII. *Were Cancellation Provisions Arbitrary and Capricious?*

A. *Findings and Conclusions of District Court*

In both its memorandum decision and subsequent findings of fact and conclusions of law the district court concluded that the cancellation provisions were arbitrary and capricious for several reasons. First, the court noted that "Plaintiffs' forfeiture stands in marked contrast to those persons who left Waste King's employment between January 31, 1970 and January 31, 1973, prior to the 24-month period." The employees in the latter group did not forfeit past service credit even if they had only one year of future service credit and nine years of past service credit. In contrast, members of the plaintiff class, who had up to six years of future service credit, lost all past service credit. Consequently, the court found that "These provisions cancelling past service credit for plaintiffs and not employees who left employment at least two years earlier are arbitrary and capricious on their face and as applied to plaintiffs."

Second, the district court concluded that "the application of the cancellation and relief provisions caused a sizeable exclusion of employees from pension benefits without a reasonable justification for this exclusion." Although the court recognized that "actuary insolvency is a critical determination", it concluded "that there were better ways the Fund could have accomplished this . . . if indeed the Fund was faced with an unfunded liability resulting from Waste King's termination of participation in the Fund."

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[12] In its memorandum decision, the district court relied on *Lee* v. *Nesbitt*, *supra*, in supplying the voluntary/involuntary test.

Finally, the court found that "The trustees of the fund violated [ERISA] Section 404(a)(1) because they treated plaintiffs disparately from other employees by canceling their past service credit." Although the court concluded that the ERISA, 29 U.S.C. § 1002(37), specifically permitted a multiemployer plan to provide for cancellation of past service credit, the court determined that this could not "validate provisions that are otherwise objectionable because they are discriminatorily applied."

B. *Application of Arbitrary and Capricious Standard*

At the outset, we recognize that "[t]he pension is not a defined contribution plan (in which each participant's entitlement is a function of his contribution) but a defined benefit plan for which 'there is no precise "fit" between any individual employee's contribution history and that employee's entitlement to benefits.'" *Central Tool Co.* v. *International Ass'n of Machinists National Pension Fund*, 523 F. Supp. 812, 817 (D.D.C. 1981). The court's affirmative participation should be limited to "those cases where the eligibility requirements are so patently arbitrary and unreasonable as to lack foundation in factual basis and/or authority in governing case or statute law." *Roark*, 401 F.2d at 429. And, the courts will substitute their judgments for the judgments of the trustees, "only if the actions of the trustees are not grounded on any reasonable basis." *Ponce*, 628 F.2d at 542.

After recognizing the limits of the court's participation in evaluating eligibility requirements of a pension plan, the court in *Roark* continued:

> We do say that when such employees are *denied* pensions by a requirement which would *give* pensions to employees having worked a substantially lesser period of time for contributing employers, the bur-

> den is on the trustees to show some rational nexus between the Fund's purpose and the requirement.

401 F.2d at 429.[13]

The appellees have been similarly *denied* pensions by a requirement which would *give* pensions to employees having worked a substantially lesser period of time for a contributing employer. The district court examined the effect of the cancellation provisions on various groups of employees. Specifically, the court compared the effect of the rule on the class of plaintiff-appellees to the effect of the rule on those employees who left Waste King employment more than twenty-four months before January 31, 1975. An employee who left Waste King employment more than twenty-four months before that date did not forfeit past service credit, even if that employee had only one year of future service and nine years of past service. On the other hand, members of the plaintiff class who had up to six years of employment while Waste King was making payments into the fund, lost all past service credit. Appellees actually worked for a contributing employer for as many as six years and received no benefits, while others who may have worked only one year for a contributing employer could receive benefits (upon reaching age 50) simply because they left the employer more than two years before the union decertification.

"[T]he primary purpose of section 302(c)(5) is to insure that pension benefits are awarded to 'as many

[13] *Roark* was an action by retired coal miners against trustees seeking, inter alia, damages and an order compelling their enrollment as beneficiaries of a trust fund and also seeking injunctive relief. The district court had granted the miners' motion for summary judgment. The court of appeals held that the pension applicants had made a *prima facie* case of unreasonableness in the requirement that the applicant's last regular employment must have been with a contributing operator, but remanded for a hearing at which the trustees would be allowed to show what, if any, reasonable relationship existed between the purpose of the trust and the requirement.

intended employees as is economically possible'." *Ponce*, 628 F.2d at 543, quoting from *Gaydosh* v. *Lewis*, 410 F.2d 262, 266 (D.C. Cir. 1969). See also § 404(a)(1) of the ERISA, note 7, *supra*. The Fund urges the court to focus on the fundamental goal of the Fund trustees: "to protect the Fund, that is, the participants and their employers, who have made and are keeping their long-term commitments to contribute to the Fund, against the financial damage which invariably and inevitably results from terminations of employer participation." We find that the purpose of the Fund is to provide benefits to as many intended employees as is economically possible while protecting the financial stability of the Fund.

The trustees argue that the cancellation provisions are necessary and reasonable to preserve the financial stability of the Fund. The Fund cannot support an "unfunded liability" to pay pension benefits when the employer's "stream of contributions" terminates. Thus the cancellation provisions are reasonably designed to encourage continued participation in the Fund, and, in the event of withdrawal from the Fund, to protect the Fund from accumulation of "unfunded liability."

Appellees concede that the cancellation provisions, if shown to be necessary to preserve the financial integrity of the Fund, would be valid. They agree also that the Fund is correct in contending that the fiscal integrity of the plan depends upon continuing contributions from the employer to pay not only for the current service credit but also to amortize the liability for past service credit. But, although the Fund's concerns are "legitimate in the abstract," appellees argue that "they have no basis in fact because the Fund did nothing to determine if those concerns [about financial integrity] existed when it cancelled the past service credit of Elser and Thomas and the class they represent."

It is true, as appellees contend, that the Fund offered no evidence to show that the failure to cancel past service credit would result in an unfunded liability that

would affect the actuarial soundness of the plan. It was stipulated that "The Fund has never calculated the total unfunded liability for Waste King as of January 31, 1975." [14] There was, in other words, no evidence to show whether or not Waste King's four to six years of contributions on behalf of the plaintiffs would be sufficient to provide for the plaintiffs' pension payment without threatening the financial stability of the Fund.

In *Central Tool, supra*, the plaintiff [15] argued, as here, that the cancellation of forfeiture provisions were arbitrary and capricious because they discriminated among participants and because they were not actuarially jusified. In a careful analysis of the I.A.M. pension plan, the court noted that "It is the purpose of the forfeiture provision to protect the fund from the dumping of unfunded liability as a result of an employer's termination of participation after past service credits have been granted to its employees." Recognizing that "the goal itself is unexceptionable" and that "[a] forfeiture provision may be reasonable if it is actuarially necessary," the court found that the Trustees of the Fund had "not offered any actuarial evidence to support their claim that the provision is tailored to the need to protect the fund." 523 F.Supp. at 816.

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[14] It was stipulated further that the contributions made by Waste King to the Fund from 1969 to 1975 totaled $433,728.00, and that as of January 31, 1975, there were "approximately 66 individuals employed in a bargaining unit capacity for 10 or more continuous years." Appellees argue that the contributions, "a substantial portion of which was contributed on behalf of non-class members who did not possess vested pension rights, succeeded in financially backing the past service credit which was arbitrarily rescinded by the Fund."

[15] In *Central Tool*, the cancellation provisions were challenged by an employer, whose employees were former participants in the pension fund. The Fund had cancelled past service credits for all employees who did not fit into any of the excepted categories. The employer had agreed at the time of termination to establish its own pension fund for the benefit of its employees and to pay the benefits that would have been paid under the defendants' plan.

The court concluded in *Central Tool* that the forfeiture provisions "must be reasonably tailored overall to meet their objectives, that is, there must be a rational relationship between the means and the objective . . . and that the forfeiture provisions may not impose a penalty of greater scale then would be necessary to protect the fund from the dumping of unfunded liability." *Id.* at 817. The court concluded further that in light of the availability of less drastic means to accomplish the objectives of fund preservation[16] the challenged provisions were arbitrary and capricious on their face and hence constituted a structural violation of section 302 of the LMRA.[17]

We agree with the holdings in *Roark* and *Central Tool* and conclude that under the circumstances of this case the Fund had the burden of showing some rational nexus

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[16] In concluding that "far less punitive means than forfeiture" were available to accomplish the legitimate objectives of fund preservation, the court said: "For example, the plan agreement itself contains a separate provision, not challenged here, to remedy the problem of employers terminating from the plan within the first four years of plan participation. The agreement provides that, in the event of such a termination, pension benefits shall only be reduced to the extent necessary to prevent the dumping of unfunded liability (calculated on the basis of a comparison of contributions and actuarially anticipated benefits payments). Defendant has proffered no explanation for the failure of the plan agreement to apply such an actuarially-based mechanism to protect the fund from unfunded liability with regard to the employee groups here involved." 523 F. Supp. at 818.

[17] See also *Winpisinger* v. *Aurora Corp. of Ill., Etc.*, 456 F. Supp. 559 (N.D. Ohio, 1978), where the court considered in detail the I.A.M. pension fund and held invalid a portion of the plan insofar as it applied retroactively to cancel past service credit of two special classes. The court concluded that "if the Trustees choose to 'protect the fund' through a forfeiture of past service credits, the forfeiture must fall evenly on all participants in the Fund. To do otherwise would violate section 1104(a)(1) by virtue of not being an action of the Trustees that is 'solely in the interests of the participants and beneficiaries.' " *Id.* at 573.

between the Fund's purpose and the forfeiture provisions. There is, of course, no question that preservation of the financial integrity of the Fund is a central concern of the trustees. *Robinson*, 453 U.S. 322. This is clearly recognized in *Roark* and *Central Tool*. But here, as in *Central Tool*, appellant had submitted no actuarial evidence to support its contention that the forfeiture provisions are necessary or reasonable to protect the financial stability of the fund.[18]

VII. *Conclusion*

We conclude that (1) the district court's holding that the plaintiffs-appellees did not waive claims to past service credit by the decertification of the union is correct; and (2) the cancellation provisions depriving the appellees of past service credit are arbitrary and capricious, and have a structural defect in violation of § 302 of the LMRA and § 404 of the ERISA by reason of appellant's failure to meet its burden of showing a reasonable relationship between the cancellation provisions and the purpose of the fund, i.e., that the provisions were necessary to preserve the financial soundness of the Fund.[19] The judgment of the district court is affirmed.

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[18] We recognize that there is language in *Wilson* v. *Board of Trustees*, *supra*, which tends to support the Trustee's contention that they were not required to show that the forfeiture provisions were necessary to protect the financial soundness of the fund. *Wilson*, however, is distinguishable in part by reason of the court's finding that Wilson's break in employment was "voluntary". The court in *Wilson* concluded: "Rules in many settings frequently overreach in order to secure their objectives with certainty. This does not in all circumstances make them unreasonable or arbitrary. One must weigh the extent of the overreaching against the importance of certainty. We have done this and find the overreaching, if such it be, in this case tolerable and neither unreasonable nor arbitrary." 564 F.2d at 1302.

[19] Having reached this conclusion, it is unnecessary to consider further the "sizeable exclusion/reasonable justification" standard or the adequacy of the notice to plaintiffs.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 80-6095, 81-5024

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees and Cross-Appellants,

v.

I.A.M. NATIONAL PENSION FUND,
Defendant-Appellant and Cross-Appellee.

[Filed Nov. 10, 1982]

Before: HAYNSWORTH * and CHOY, Circuit Judges and JAMESON,** District Judge.

ORDER

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judge Choy voted to reject the suggestion for rehearing en banc and Judges Haynsworth and Jameson recommended denial of the en banc request.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Clement F. Haynsworth, Jr., Senior Circuit Judge, United States Court of Appeals, Fourth Circuit, sitting by designation.

** The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

No. 82-1325

IN THE

Supreme Court of the United States

October Term, 1982

I.A.M. NATIONAL PENSION FUND,

Petitioner,

vs.

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated, pray that the Petition for Writ of Certiorari to review the judgment of the Court of Appeals for the Ninth Circuit be denied.

STATUTES INVOLVED

In addition to the statutes cited and quoted by the Petitioner, the Respondents believe that the following additional provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §1000 *et seq.*, are pertinent.

Section 2(a) of ERISA, 29 U.S.C. §1001(a), provides in part:

"The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; . . . that despite the enormous growth in such plans *many employees with long years of employment are losing anticipated retirement benefits* owing to the lack of vesting provisions in such plans; . . . and that it is therefore desirable in the interests of employees and their beneficiaries . . . *that minimum standards be provided assuring the equitable character of such plans* and their financial soundness."

Section 2(b) of ERISA, 29 U.S.C. §1001(b), further states:

"It is hereby declared to be the policy of this Act to protect . . . the interest of participants in employee benefit plans and their beneficiaries, . . . *by establishing standards of conduct, responsibility, and obligation for fiduciaries* of employee benefit plans . . . ."

And lastly, Section 2(c) of ERISA, 29 U.S.C. §1001(c), announces:

"*It is hereby further declared to be the policy of this Act to protect . . . the interests of participants in private pension plans and their beneficiaries by improving the equitable character* and the soundness of such plans *by requiring them to vest the accrued benefits of employees with significant periods of service* . . . ."

Section 203(c)(1)(B) of ERISA, 29 U.S.C. §1053(c)(1)(B), states:

"A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) unless each participant having not less than 5 years of service is permitted to elect, within a reasonable period after adoption of

such amendment, to have his nonforfeitable percentage computed under the plan without regard to such amendment."

STATEMENT OF THE CASE

A. Statement of Facts.

In its Petition for Writ of Certiorari, the Petitioner does not set forth a statement of facts. Rather, throughout the Petition, it selectively emphasizes certain factual contentions, some of which are either erroneous or not set forth in the Excerpts of the Clerk's Record.[1]

As a result, the Respondents direct the Court to the relevant facts set forth in the opinion of the United States Court of Appeals for the Ninth Circuit in this case. [*See* App. 28a-46a to Pet. for Cert.]

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[1]An example of this is the Petitioner's mistaken assertion that it relied upon ERISA in adopting and implementing its forfeiture provisions in this proceeding. [*See* pg. 12 of Pet. for Cert.]

ARGUMENT

A. The Circuit Court's Decision Is Correct Without Regard to the Questions Sought to Be Raised by the Petition and It Turns Upon Its Own Set of Unique Facts and Circumstances.

As noted by the Petitioner,[2] besides determining that the forfeiture provisions were arbitrary and capricious on their face and as applied under the particular facts and circumstances of this case, the district court concluded that the Petitioner's conduct violated both Section 404(c)(1) of ERISA, 29 U.S.C. §1104(a)(1), and Section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. §186(c)(5) ("LMRA"), on the separate but related ground that a reasonable justification did not exist for the adoption and application of the forfeiture provisions which resulted in a sizeable number of previously vested individuals becoming divested for pension purposes.

Additionally, the district court found that class member Madge Elser and those others similarly situated did not receive adequate and sufficient notice of the forfeiture requirements and thus were not afforded a reasonable opportunity to insulate themselves from the harsh impact upon application.

In affirming the district court's holding that the Petitioner's adoption and application of the forfeiture provisions were arbitrary and capricious and constituted violations of both the LMRA and ERISA, the circuit court did not address the other two (2) separate and distinct grounds the district

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[2]Pg. 10, n. 10 of Pet. for Cert.

court relied upon in ruling for the Respondents. [*See* App. 46a n. 19.][3]

Additionally, the Petitioner's conduct violated Section 203(c)(1)(B) of ERISA, 29 U.S.C. §1053(c)(1)(B), in that by cancelling the Respondents' past service credit, the Petitioner divested the Respondents of a vested pension without first affording them the statutory 203(c)(1)(B) option.

Thus, the Petitioner not only violated Section 404(a)(1) but Section 203(c)(1)(B) of ERISA as well. *In accord, Fentron Industries v. Nat. Shopmen Pension Fund*, 674 F.2d 1300, 1306 (9th Cir. 1982). [*See* App. 38a n. 8.][4]

B. The Circuit Court's Decision Does Not Conflict With This Court's Decision in Robinson.

The Petitioner suggests that this Court in *Robinson* "unequivocally repudiated" decisions rendered by *every* circuit court that have concluded that federal courts possess

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[3]The district court concluded that class member Margaret E. Thomas and those similarly situated received adequate notice. That finding was the subject of the Respondents' Cross-Appeal to the circuit court which it similarly did not address.

[4]Like this Court's decision in *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982), the *Fentron* decision, pursuant to Fed.R.App.P. 28(j), was brought to the circuit court's attention after oral argument but before the court rendered its decision.

Although, admittedly, the Respondents did not advocate that any provision of ERISA other than Section 404(a)(1) was violated, the Petitioner similarly did not stress that its actions were lawful under Section 203(b)(1)(C) of ERISA, 29 U.S.C. §1053, or the subsequent statutory regulations interpreting and implementing ERISA's vesting standards which are so heavily relied upon in its Petition to this Court because Part 2 of ERISA governing vesting *did not take effect until January 1, 1976 and therefore did not govern the conduct scrutinized by the circuit court in this proceeding.*

This is further evidenced by the fact that the forfeiture requirements and the method of implementing them were not significantly changed as of January 1, 1975, the date the fiduciary duties provisions of ERISA [Section 404] took effect.

As a result, since *all* the facts which gave rise to this proceeding occurred *prior* to January 1, 1976, the circuit court's holding turns upon its own set of unique facts and will affect few if any litigants other than those involved in this proceeding.

the right under Section 302 of the LMRA to judically examine trustee discretion and determine whether that discretion has been abused by the adoption or implementation of arbitrary or capricious standards.

On the contrary, this Court in *Robinson* acknowledged that circuit courts have uniformly sat as courts of equity and enforced those fiduciary duties and expressly declined to review that conduct. *See* 102 S.Ct. at 1233 n. 12. The circuit court, acknowledging this Court's failure to directly address this issue in *Robinson*, similarly declined to reach the issue, relying instead upon the proposition that ERISA " 'codified the strict fiduciary standards that a §302(c)(5) trustee must meet' ", citing this court's decision in *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 332 (1981) for that conclusion. [*See* App. 37a.]

The circuit court concluded, and rightly so, that *Robinson* should not control because *Robinson* was not confronted with an ERISA violation and the trustee conduct examined in this proceeding was not governed or dictated by a collective bargaining agreement.

Since this case concerns an ERISA claim[5] and the legality of pension forfeiture rules determined initially and exclusively by the trustees of a trust fund, the circuit court harmonized its decision with *Robinson*. It did repudiate or conflict with it, as the Petitioner suggests.

In *Robinson*, this Court, in quoting from one of the sponsors of the floor amendment that eventually became Section 302 of the LMRA, emphasized that the primary purpose of Section 302 is to protect the fiscal rights of the employees

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[5]The decision in *Western Conference of Teamsters Pension Trust Fund v. Music*, __U.S. __, 74 L.Ed. 2d 48 (1982), *vacating and remanding* 600 F.2d 400 (9th Cir. 1981), also did not address violations of ERISA. *See* 660 F.2d 400, 405 n. 13.

since, after all, trust fund contributions " 'are in effect compensation to his [the employer's] employees' " and that all that is sought " 'is to see to it that the rights of employees in the fund are protected.' " 102 S.Ct. at 1232 n. 10.

In affirming the district court, the circuit court found a violation of Section 302 of the LMRA because *the Petitioner was financially penalizing those employees it should be compensating and rewarding those employees it should be penalizing.* The circuit court expressed little difficulty in reaching this result because the Petitioner was granting pensions to employees who had been compensated substantially less than the Respondents. It matters little to the Respondents whether their compensation ends up in the coffers of a greedy employer, corrupt union official or an undeserving fellow employee. The purpose of Section 302 of the LMRA was to hopefully insure that employees would eventually receive their deferred compensation. Irrespective of *who* receives it, the employees who should have received the compensation [a vested pension] and on whose behalf most of the compensation was made, the Respondents, did not receive it. That's why Section 302 of the LMRA was violated in this proceeding.

C. The Circuit Court's Holding Relying Upon ERISA Imposes the Same Substantive Standards That Courts Were Employing Prior to Its Passage Under Section 302 of the LMRA.

As both the circuit court and this Court in *N.L.R.B. v. Amax Coal Co., supra*, indicated, ERISA's concern with regulating the administration of trust funds cannot be employed for the proposition that trustee conduct once declared unlawful under Section 302 of the LMRA is now legally permissible under ERISA.

In drafting ERISA, Congress only statutorily pronounced what courts have been specifically requiring of trust funds for many years under Section 302 of the LMRA: that, *under reasonable circumstances*, it is permissible for a trust fund to provide for the forefeiture of past service pension credit. ERISA and the subsequent statutory and administrative regulations implementing it which stand for the notion that a pension plan can specifically provide for the cancellation of past service pension credit upon an employer's cessation of contributions did not add to or delete from the requirements that have always been imposed upon trustees by courts interpreting similar trust provisions in multi-employer plans prior to its passage under Section 302(c) of the LMRA. This aspect of ERISA was old news recycled statutorily since the authority to cancel past service pension credit had always existed under Section 302 of the LMRA *as long as it was reasonable under the circumstances*. Trustee decisions under ERISA, which are only entitled to judicial deference if they are well-founded and not repugnant to ERISA's equitable purposes, do not change that.

Other courts which have examined this have similarly ruled that the "reasonableness" requirement of Section 302 of the LMRA has equal force and effect under ERISA. *See e.g., Baltimore Rebuilders, Inc. v. N.L.R.B.*, 611 F.2d 1372, 1379 and 1380 (4th Cir. 1979), *cert. denied*, 447 U.S. 922 (1980) and *Winpisinger v. Aurora Corp. of Ill., etc.*, 456 F.Supp. 559, 562 n. 4 (N.D. Ohio 1978), where the court announced, relying upon the legislative intent found in Title I of ERISA quoted hereinabove, that a fiduciary under ERISA "is forbidden from granting preference as between a plan's participants or as between a plan's beneficiaries" and that "Congress intended that the fiduciary duties requirements of 404(a)(1) [of ERISA] should be interpreted so that employees with long years of em-

ployment would not lose 'anticipated retirement benefits' when under plans that contain vesting provisions a loss is caused by a fiduciary's preferential treatment of participants or beneficiaries."

The Petitioner has cited no case authority for a contrary conclusion because, quite frankly, none exists.

The circuit court concluded that the forfeiture requirements adopted and implemented by the Petitioner were not consistent with the requirements of Section 302 of the LMRA. Additionally, the court determined that ERISA and its allowance for the *reasonable* cancellation of past service pension credit upon an employer's cessation of contributions not only did not alter that result but statutorily required it.

A contrary conclusion, as advocated by the Petitioner, would not only result in the demise of the arbitrary and capricious standard of review in evaluating trustee conduct under Section 302 of the LMRA and ERISA but even more disturbingly, allow trustees to act whimsically, arbitrarily and capriciously in disbursing pension contributions as long as the compensation is received by *any* participant or beneficiary of the plan without any judicial supervision or intervention whatsoever! Such dire consequences were not contemplated, let alone discussed, by the legislative drafters of ERISA.

As indicated hereinabove, Congress in passing ERISA was concerned with the fact that employees were losing anticipated pension benefits and that trustees, in determining pension eligibility, were not acting as equitably as they should in exercising their fiduciary discretion and responsibilities in that regard. An expressed legislative purpose of ERISA was to statutorily insure that pension eligibility would be determined equitably by requiring that pensions vest after employees have worked a significant period of

time. Contrary to the Petitioner's assertions, the circuit court's holding is consistent with that congressional intent. If anything, ERISA requires that trust funds act *more* reasonably and equitably in making pension eligibility determinations than was legally necessary before its passage.

The circuit court concluded that under the unique facts and circumstances of this case, the fiduciary standards statutorily imposed upon trustees under ERISA were violated. In doing so, the circuit court acted in conformity with Congress' intent that federal courts are judicially responsible for insuring that trustees act reasonably and equitably in making pension eligibility determinations.

CONCLUSION.

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,

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No. 82-1325

IN THE

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SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated, pursuant to Rule 22.6 of this Court, wish to bring to the Court's attention two cases, decided by the Ninth Circuit Court of Appeals since the Respondents filed their Brief In Opposition To Petition for Writ of Certiorari, which follow and expound upon *Elser v. I.A.M. National Pension Fund*, 684 F.2d 648 (9th Cir. 1982).

The two decisions, *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, ___ F.2d ___, No. 82-4369, filed on March 22, 1983 and *Hurn v. Retirement Fund Trust of*

the Plumbing, Heating and Piping Industry of Southern California, ___ F.2d ___, No. 82-5032, filed on April 4, 1983 are reproduced in the Appendix to this Supplemental Brief at pages 1a-19a.

Respectfully submitted,
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APPENDIX

Edmund J. Harm, Plaintiff-Appellant, vs. Bay Area Pipe Trades Pension Plan Trust Fund, Defendant-Appellee.

No. 82-4369

United States Court of Appeals For The Ninth Circuit

[Filed on March 22, 1983]

Appeal from the United States District Court for the Northern District of California.

William H. Orrick, District Judge, Presiding. Argued and Submitted January 13, 1983.

Before: MERRILL, GOODWIN, and SNEED, Circuit Judges.

SNEED, Circuit Judge:

Appellant Edward Harm, a retired plumber, appeals from the district court's grant of summary to the Bay Area Pipe Trades Pension Plan Trust Fund. He filed a timely appeal and invokes our authority pursuant to 28 U.S.C. Sec. 1291. We affirm.

I.
FACTS

Harm, a member of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, retired in March 1977. Although he had worked as plumber for twenty-five years, he was only forty-five. He qualified for the Plan's service retirement benefit, which authorized employees who had not reached the normal retirement age of sixty-five to receive benefits if they had twenty-five years of credited service. He began receiving benefits of $605.82 per month.

In 1978 Harm moved from Northern California to Carson City, Nevada, where he became sole proprietor of a plumb-

ing business. Harm performed a variety of managerial tasks in his business, but he did not perform any of the fifty-one tasks in the union's work classifications. The Plan, learning of his activity, suspended his benefits on October 1, 1979. It claimed that its rules required it to suspend the benefits of any service retiree working in the pipe trades industry until the retiree became eligible for normal retirement benefits.

II.
DISPOSITION BY TRIAL COURT AND ISSUES ON APPEAL

Harm filed for declaratory relief, alleging that the suspension was invalid because his activity was not "work" in the pipe trades industry and so did not fall within the suspension rule. He also argued that any rule suspending benefits to service retirees working outside the Plan's geographic area violated section 404 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Sec. 1104. Finally, he argued that were the suspension legal, it could last only as long as he remained in business.

Both parties moved for summary judgment. The district court held that the Plan could not continue to suspend Harm's benefits if he closed his business,[1] but it found that the suspension would remain legal until then. The Plan did not appeal the court's holding on the length of benefit suspension, so that issue is not before us. The only issues are before us:

[1]When Harm retired in 1977, the Plan only suspended benefits during the period of employment. The trustees amended it, effective January 1, 1979, to require suspension from a retiree's return to employment until he reached normal retirement age. The district court found the trustee's attempt to apply this provision retroactively unlawful under Brug v. Pension Plan, 669 F.2d 570 (9th Cir. 1982).

(1) Is the trustees' interpretation that Harm's business activities constituted "work" in the pipe trades industry arbitrary and capricious?

(2) Is a rule suspending the benefits of sole proprietors operating outside the Plan's geographic area in violation of section 404?

III.
STANDARD OF REVIEW

When reviewing the record in this case we engage in de novo review. For us to affirm the district court, we must be convinced that there is no genuine issue of material fact and that the Plan is entitled to summary judgment as a matter of law even when we review every conflict in the evidence most favorably to Harm. *See ILGW v. Sureck*, 681 F.2d 624, 628-29 (9th Cir. 1982); *Heiniger v. City of Phoenix*, 625 F.2d 842, 843 (9th Cir. 1980).

IV.
IS THE TRUSTEES' INTERPRETATION ARBITRARY?

In suspending Harm's benefits the trustees relied on article I, section 4 of the Plan, which prohibited service retirees from receiving benefits upon returning to "work" anywhere in the trades industry.[2] Section 16 of article I

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[2]This provision provides in part:

> Section 4. Disqualification Upon Return to Work
>
> It is intended that Normal or Early Retirement Benefits, or the Service Retirement Benefit, will be payable only to those Employees who retire from work in the Pipe Trades Industry. Therefore, any retired Employee who returns to such work shall be disqualified from the receipt of any retirement benefits during any month in which he performs such work. Such benefits will be discontinued as of the first of the month following his return to active employment as stated above.
>
> Payment of retirement benefits, at the monthly rate in effect prior to his re-employment, will be resumed following submission of evidence satisfactory to the Trustees that the Employee has ceased employment.

defined "work" as including "all work, public or private, covered, or if not actually covered, of the type covered. . . , whether performed as an employee, supervisor, sole proprietor, member of an unincorporated firm, or officer of a corporation." Harm, while conceding that his employees performed work in covered employment, argues that he did not because he only hired and managed them. In his view section 16 should apply to sole proprietors only if they perform tasks in the union's work classifications.

He bolsters his position by arguing that we should weigh all doubts in interpretation against the appellee because it drafted the regulations. Standard rules of contract interpretation, however, do not apply in this case.[3] Instead, the Plan's interpretation must be sustained as long as it is reasonable. *See Smith v. CMTA-IAM Pension Trust,* 654 F.2d 650, 655 (9th Cir. 1981); *Gordon v. ILWU-PIMA Benefit Funds,* 616 F.2d 433, 439-40 (9th Cir. 1980). To overturn the Plan's reading of its rule, Harm must demonstrate that it is arbitrary and capricious or erroneous with respect to a question of law. *Smith,* 654 F.2d at 654-55; *Gordon,* 616 F.2d at 439-40.

This Harm had not done. The Plan cut off benefits for "all work . . . performed as (a) sole proprietor." Work "performed as a sole proprietor" standing alone would certainly encompass Harm's managerial activity. It is not limited to manual labor performed by a sole proprietor. The core of the functions that attach to a sole proprietor are

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[3]*See* Rehmar v. Smith, 555 F. 2d 1362, 1368-69 (9th Cir. 1976). Judicial scrutiny is limited to allow the trustees to play their role in pension fund administration. The need for federal law to override state law may not arise, however, when trustees interpret trust rules that govern their own position. *See* Culinary & Serv. Employees Union v. Hawaii Employee Benefit Administration, 688 F.2d 1228, 1230 (9th Cir. 1980) (applying standard rules of contract interpretation to rule governing appointment and removal of trustees.)

managerial. When faced with the similar problem of describing an employer working on jobs traditionally handled by employees, the Plumbers employed a new classification, "working employer," in its collective bargaining agreement. The Plan's failure to use similar language weighs heavily against Harm's position.

Harm argues that "performed as a sole proprietor," as used in section 16, must be subordinated to the preceding clause defining penalized work as "covered (or) of the type covered." When so subordinated, it would follow that only a retiree who "performed as a sole proprietor" in employment "covered (or) of the type covered" would lose benefits. This reading of the rule is implausible. Suspension for work "covered . . . or of the type covered" already encompassed all union and nonunion jobs in the work classifications. This covers the field if Harm's interpretation were accepted. There would be no need to add a separate clause stating "whether performed as an employee, supervisor, sole proprietor, member of an unincorporated firm, or officer of a corporation." These clauses must embrace something else. It is unlikely that their reach extended only to supervisors, sole proprietors, or corporate members or officers who occasionally wielded a wrench or laid a pipe. The Plan's position that work "performed as a sole proprietor" was designed to cover Harm's everyday business activities is reasonable.

V.

DOES THE RULE VIOLATE SECTION 404 OF ERISA?

Under section 404, as under the similar provisions of section 302 (c)(5) of the Labor Management Relations (Taft-Hartley) Act, *id.*, 186 (c)(5), trustees with the discretion to establish benefit provisions must act solely in the interests of "participants and beneficiaries." We have implemented

this requirement with the "structural defect" test. Under it rules that exclude employees from receiving benefits, for reasons which are arbitrary and capricious, violate section 404.[4] *Miranda v. Audia*, 681 F.2d 1124, 1125 (9th Cir. 1981); *Fentron Industries v. National Shopment Pension Fund*, 674 F.2d 1300, 1307 (9th Cir. 1982); *Brug v. Pension Plan*, 669 F.2d 570, 573-79 (9th Cir. 1982.) Moreover, our decisions have erected certain presumptions that trustees must refute to avoid the "arbitrary and capricious" brand. If a rule, for example, excludes a disproportionate number of employees from receiving benefits, we hold that the burden shifts to the trustees to show a reasonable purpose for the exclusion. *Miranda*, 681 F.2d at 1125-27; *Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537, 543-45 (9th Cir. 1980). Also a rule that denies pensions to employees who have worked a substantially greater time than others who received benefits also shifts the burden to trustees to show a rational connection between the rule and the fund's purposes. *Elser v. I.A.M. National Pension Fund*, 684 F.2d 648, 655-56 (9th Cir. 1982). So too the trustees cannot adopt a rule that retroactively deprives employees of benefits without giving them an opportunity to comply with the new rule, *Burroughs v. Board of Trustees*, 542 F.2d 112, 1131 (9th Cir. 1976) or deprives them of vested benefits because of an involuntary break in employment, *Lee v. Nesbitt*, 453 F.2d 1309, 1311-12 (9th Cir. 1972).

Harms, however, does not persuade us that the Plans' suspension rule violated ERISA. It is true that the rule would allow unemployed service retirees with substantially less credited service than Harm to receive benefits, thus shifting

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[4]No claim is made that these rules were adopted in collective bargaining, so the standard of review in United Mine Worker v. Robinson, 102 S. Ct. 1226 (1982), does not apply.

the burden to the Plan to show a rational basis for the rule. The Plan, however, met this burden by showing a reasonable basis for suspending the benefits of *all* employed service retirees. As both its actuary and the co-chairman of the trustees stated, the Plan funded service retirement on the assumption that most retiree who did not was heavy. Harm and his spouse, under his interpretation, would be entitled to $141,557 in service retirement benefits without regard to the locations of his employment. This was more than the $128,848 the Plan anticipated paying Harm in normal retirement benefits, and greatly in excess of the $19,703.02 that Harm's employers had paid into the Plan for him. These excess benefits would have come largely from the stepped-up contributions of current participants. Thus the Plan's suspension of Harm's benefits was not arbitrary or capricious.

Harms alleges that his loss of benefits was illegal because "(t)he Plan has offered no grounds showing how HARM's employment in Nevada . . . . caused the PLAN, the Locals, or the contributing employer any prejudice or damage." This is not so. As already indicated, Harm's move to Nevada did not reduce the financial burden on the Plan; the relationship between prior payments into the Plan for Harm and his benefits remained the same. The Plan was therefore justified in treating him in the same manner as it did other working service retirees.[5] The Plan did not have to pay him when it did not pay all employed service retirees. The alleged differences in impact on the Plan's contribution base between Harm's employment without the Plan's geographic area and that of retirees within the area does not invalidate

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[5]Harm did fare differently from service retirees who worked as employees; their normal retirement benefits, unlike his, increased as they continued to work. This is only an apparent inequality however, because Harm was freed from having to pay the contributions that would fund his increased benefits.

the rule.[6] *See Wilson v. Board of Trustees*, 564 F.2d 1299, 1302 (9th Cir. 1977).

Nothing in *Elser* requires us to impose a heavier burden on the trustees. In *Elser* the trustees sought to defend their cancellation of the past service credits of employees whose employer had withdrawn from the fund. The trustees claimed that their action was needed to avoid excessive unfunded liability. Faced with this justification, the court required them to show "that the forfeiture provisions were necessary to protect that financial soundness of the Fund." 684 F.2d at 658 & n. 18 (emphasis added.) The court found for the employees after it discovered the the trustees had never calculated their unfunded liability, and that there were other ways to meet their obligations. *Elser's* approach should be read in light of the standard of review set out in *Ponce*, which held that once a plaintiff establishes the existence of a structural defect, "the burden shifts to the trustees to show the reasonableness of the requirement." 628 F.2d at 543; *see, e.g., Miranda*, 681 F.2d at 1126-27. Although we described the burden that shifts as the burden of proof, 628 F.2d at 543-44, the trustees can meet this burden by showing "any reasonable basis" for their action, *see id.*, at 542.

[6]The Plan offers two reasons to reject Harm's argument this his employment, unlike that of retirees in the Plan's geographic area, could not affect its contribution base. First, he might displace migrating employees whose employer sent contribtions back to the Plan under its "home" policy. Second, its enforcement of its rule could encourage other plans to enforce similar rules, thus preventing an influx of employees into the Plan's area and increased competition for jobs with contributing employers. We do not address these arguments because we find the Plan's financial justification adequate to support its rule.

This has been done in this case.[7]

Harm's other arguments can be disposed of quickly. Deference to the Department of Labor regulation in 29 C.F.R. Sec. 2530-203-3 (a) (1981) neither determines our decision nor did it that of the district court. Harm's view that he is entitled to benefits under ERISA because "the primary reasons for ERISA (is guaranteeing) a retiree that he receive his pension benefits as promised after years of qualifying service" does not entitle him to benefits here. Congress has never envisioned, either in ERISA or the Taft-Hartley Act, a one-to-one correspondence between payments and benefits. *See Elser*, 684 F.2d at 655-56; *Ponce*, 628 F.2d at 542-42. ERISA's focus is on normal retirement. It would prevent a suspension were Harm of normal retirement age, *see* section 203 (a), 29 U.S.C. Sec. 1053 (a), but it has left

[7]Only some decisions need be shown "necessary to protect the soundness of the Fund." If, as *Elser*, the only explanation offered for à change in benefits is that it was compelled by financial necessity, there must be some evidence that such is the case. Other rules may represent a choice among competing policies or rely on behavioral predictions that are not susceptible to verification. In this latter group are that break-in-employment rules, which rest on the trustee's prediction that employees will be encourages to seek continuing employment in the industry, selection or matching of actuarial probabilities to the conditions of an industry fall more fully to the trustees' discretion. *See* Souza v. Trustees of Western Conference, 633 F.2d 942, 946-47 (9th Cir. 1981); *Ponce*, 628 F.2d at 542; *Wilson*, 564 F.2d at 1302. The trustees can act in these areas without a showing of financial necessity.

The *Elser* court also cited Center Tool Co. v. I.A.M. Nat'l Pension Fund, 523 F. Supp. 812, 817 (D. D. C. 1981), which held that a plan's trustees had to accomplish any reduction in benefits following employer termination by the least drastic means. 684 F.2d at 657. In *Central Tool*, however, the plan agreement itself required that benefits be reduced only "to the extent necessary." *See id.*, at 657 n. 16. Neither *Elser* nor *Central Tool* should be reasonable alternatives in deciding the scope of a rule. *See Wilson*, 564 F.2d at 1302.

open such suspension for service or early retirees.[8] A graduated vesting of benefits that would achieve the result Harm desires may have advantages, *see* H.R. Rep. No. 533, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4644, but Congress did not adopt such a scheme. The Plan has not deprived Harm of any *normal* retirement benefits. ERISA guarantees no more.

AFFIRMED.

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[8]Harm does not raise this issue on appeal, although he contested it below. In any event, section 203 (a) only governs normal retirement benefits, see Hernandez v. Southern Nevada Culinary & Bartenders Pension Trust, 662 F.2d 617, 619-20 (9th Cir. 1981);Hurn v. Retirement Fund Trust, 648 F. 2d 1252, 1353-54 (9th Cir. 1981); it does not affect the outcome of this case.

Ellis M. Hurn, Plaintiff-Appellant, vs. Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California, Defendant-Appellee.

No. 82-5032.

United States Court of Appeals for the Ninth Circuit

[Filed on April 4, 1983]

Appeal from the United States District Court for the Central District of California.

A. Andrew Hauk, District Judge, Presiding. Argued and Submitted October 7, 1982.

Before: SNEED and ALARCON, Circuit Judges, and CORDOVA*, District Judge.

SNEED, Circuit Judge:

Appellant Ellis Hurn is a retired member of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry. His case has been before us once before. In his first complaint he alleged that the Retirement Fund Trust's suspension of his pension benefits violated the vesting provisions in section 203(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. sec. 1053(a). The district court granted the Fund summary judgment on that claim because Hurn did not meet the normal retirement age of sixty-five, a prerequisite for ERISA nonforfeitability. On appeal we agreed with the court on section 203(a)'s inapplicability, but remanded the case to allow Hurn to file an amended complaint under section 302(c)(5) of the Labor Management Relations (Taft-Hartley Act), 29 U.S.C. sec. 186(c)(5). *Hurn v. Retirement Fund Trust*, 648 F.2d 1252, 1254-55 (9th Cir. 1981). Hurn's second complaint fared no better. On cross-motions for summary judgment, the district court again granted the Fund's motion. We again reverse.

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*Honorable Valdemar A. Cordova, United States District Judge for the District of Arizona, sitting by designation.

I.
STATEMENT OF FACTS AND ISSUES

Hurn began to receive an early retirement service pension in June 1975. He was fifty-eight years old, and had accumulated twenty-five years of credit under the Fund's service retirement plan. On December 1, 1975, he accepted nomination for the presidency of his local, a nonpaying office. He alleges that the local's incumbent business manager, whose opponent Hurn supported, threatened to suspend his pension if he ran for office. He ran anyway, and although he was not elected, the Fund's trustees voted to suspend his benefits from February 1, 1976 to the beginning of October.

Hurn's dispute with the Fund is over the legality of the suspension. Fund Rule 21 dictated suspension for anyone engaging in "employment of activity," including "labor relations," in the building and construction industry. The Fund argues that the Rule encompassed nominees for union office. Hurn, of course, claims that the Rule did not. He also argues that a rule suspending nominees' pension benefits would be arbitrary and capricious, in violation of the fiduciary duties imposed on Fund trustees by section 302(c)(5). Furthermore, he claims that the trustees failed to provide adequate notice of the Rule's content and discriminated in its application, both also in violation of section 302(c)(5).

We shall address only one of these issues, *viz.*, whether Rule 21 as interpreted and applied by the Fund trustees was arbitrary and capricious and thus in violation of section 302(c)(5). Inasmuch as we hold that it was, it is not necessary for us to address Hurn's other arguments. We will assume, *arguendo,* that Rule 21 encompassed nominees for union office and that the Fund gave adequate notice of its contents and did not discriminate in its application.

II.
REVIEW PURSUANT TO SECTION 302(c)(5)

The Taft-Hartley Act governs the trustees' discretion in structuring pension rules. Section 302(c)(5) requires trustees to act "for the sole and exclusive benefit of the employees."[1] This section imposes on trustees the burden of fiduciary care, as defined on traditional equitable principles. *NLRB v. Amax Coal Co.* 453 U.S. 322, 330 (1981). Each trustee bears an "unwavering duty of complete loyalty" to employees, *id.* at 329, and this duty "to trust beneficiaries must overcome any loyalty to the interest of the party that appointed him," *id.* at 334.

A. *The Standard of Review for Rules Established in Collective Bargaining Is Inapplicable*

We acknowledge our holding would be otherwise had the details of the Fund been worked out in collective bargaining. The Supreme court held in *UMW Health & Retirement Funds*

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[1]Section 302(a), 29 U.S.C. sec. 186(a), prohibits employers from making payments to employee representatives, labor organizations, employees if in excess of normal compensation and designed to influence collective bargaining, or officers or employees of a labor organization if with the intent of influencing their actions. Section 302(c)(5) creates an exception for payments for employee representatives:

> (W)ith respect to money or other thing of value paid to a trust fund established by such representative, *for the sole and exclusive benefits of the employees of such employer,** . . . . *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, . . . ; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon . . .; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

*(Emphasis added).

v. Robinson, 455 U.S. 562 (1982), that benefits determined in collective bargaining can be overturned only if in violation of other federal law. *See id.* at 575-76. Variations in benefits in such plans are presumed to be the product of a give and take in which all parties, including the beneficiaries, are represented. The Fund insists that its rules are eligible for protection under *Robinson*. We do not agree.

In *Robinson* the Court distinguished provisions that had been the " 'subject of explicit, informed and intense bargaining,' " *id.* at 569 (quoting the district court's unpublished opinion), from those estabished by trustees with " 'full authority' to determine eligibility requirements and benefit levels," *id.* at 573. The union and mine operators in *Robinson* had reached an impasse during collective bargaining over rules governing widows' health benefits, and the final provisions were a compromise designed to end a strike. *See id.* at 567. There was every reason to believe that each side had explored the advantages and disadvantages of the alternatives before agreeing on the rules finally adopted. The Court, in shutting off inquiry into the reasonableness of these provisions, noted that "(a)s long as such conditions do not violate federal law or policy, they are entitled to the respect as any other provision in a collective bargaining agreement." *Id.* at 575.

Nothing in the record suggests that Rule 21 was established in collective bargaining. The trustees enjoyed the initiative on changes in the Fund. The formulation and pre-0.5drafting debate over all rules, including Amendment No. 36-A, which amended Rule 21 to make it embrace "employment or activity" including "labor relations," was their responsibility. Rules did have to be ratified by union and employer representatives before they could be adopted by

the trustees. Independent approval by representatives of each side, however, is not the equivalent of collective bargaining. *Robinson*, therefore, is inapplicable.[2]

B. The Arbitrary and Capricious Standard of Review for Discretionary Rules

Our authority to review Rule 21's scheme of distribution, as interpreted by the trustees, is limited to what can be implied from section 302(c)(5)'s mandate that trust rules be in the "sole and exclusive benefit" of employees.[3] To implement section 302(c)(5)'s mandate while respecting the trustees' need for discretion in conceiving a plan to maximize employees welfare, we have traditionally reviewed trust rules to ensure that they are not arbitrary and capricious, unsupported by substantial evidence, instituted in bad faith, or erroneous on a question of law. *See Rehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1977) (endorsing standard in *Danti v. Lewis*, 312 F.2d 345 (D.C. Cir. 1962)); *see, e.g., Elser v. I.A.M. National Pension Fund*, 684 F.2d 648, 654 (9th Cir. 1982); *Miranda v. Audia*, 681 F.2d 1124, 1125 (9th Cir. 1982); *Brug v. Pension Plan*, 669 F.2d 570, 573-74 (9th Cir.), *cert. denied*, 103 S. Ct. 135 (1982).

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[2]The trust agreement in *Robinson* read as if it gave the trustees some discretionary authority, *see 455 U.S. at 574 n.13, but the Court interpreted it to require them to adhere to the collective bargaining contract "unless modification is required to comply with applicable federal law," id.* The specific rules contested in *Robinson* were the product of collective bargaining, not trustee initiative, and we understand *Robinson* to apply only in such situations.

[3]Authority for review under sec. 302(c)(5) is well established in this circuit, even if its basis remains implicit. In the lead case of Alvares v. Erickson, 514 F.2d 156 (9th Cir.), *cert. denied*, 423 U.S. 874 (1975), we noted the inconclusiveness of the legislative history of sec. 302(c)(5) if looked to as a guide to our jurisdiction. *Id.* at 164. We took jurisdiction not from our inherent equitable power but from the " 'penumbra of express statutory mandate' " of section 302(c)(5). 514 F.2d at 166 (quoting Lugo v. Employees Retirement Fund, 366 F. Supp. 99, 103 (E.D.N.Y. 1973).

Under the "structural defect" test, an employee can show violation of these standards by establishing the exclusion of a large number of employees from benefits for no apparent reason. *Burroughs v. Board of Trustees*, 542 F.2d 1128, 1131 (9th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977). The trustees will still prevail if they show a reasonable purpose for their rule. *See Miranda*, 681 F.2d at 1125-27; *Ponce v. Construction Laborers Pension Trust*, 628 F.2d 537, 543-45 (9th Cir. 1980).[4]

Violations of the trustees' fiduciary duties may be easiest to see when a group of employees are deprived of benefits, but the structural defect test is not limited to group violations. The test extends to rules that arbitrarily exclude individual employees from their chance at benefits. Thus we have invalidated break-in-employment rules that retroactively cancel past service credit, *Burroughs*, 542 F.2d 1131; *see also Brug*, 669 F.2d at 575-76 (recission of amendment making clerical employees beneficiaries arbitrary and capricious as applied to employee otherwise eligible for benefits at time of recission), or divest otherwise vested benefits because of an involuntary break in employment, *Lee v. Nesbitt*, 453 F.2d 1309, 1311-12 (9th Cir. 1972). Rules that deny individual employees benefits for reasons irrational on

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[4]The results of the break-in-employment rules illustrate the broad latitude this approach accords trustees' policy selections and the rules they adopt to meet their goals. *See, e.g.*, Sailer v. Retirement Fund Trust, 599 F.2d 913, 914-15 (9th Cir. 1979) (employee whose only disqualification from benefits was failure to file notice requesting waiver of break-up-employment rule not entitled to benefits); Wilson v. Board of Trustees, 564 F.2d 1299, 1301-02 (9th Cir. 1977) (employee with over sixteen years of employment at contribution date, who would have qualified then if older, disqualified twelve years later because nine hours short of break-in-employment minimum); Giler v. Board of Trustees, 509 F.2d 848, 849 (9th Cir. 1975) (per curiam) (employee with seventeen years in pension credit at age fifty ineligible for benefit at age because of break in employment after accumulation of seventeen years of credit).

their face are also inconsistent with the trustees' obligation to administer the trust in the "sole and exclusive benefit" of all employees. The trustees must advance some reason for such rules to surmount the arbitrary and capricious barrier.

C. Application of the Arbitrary and Capricious Standard

The Fund has advanced no such reason. It presents the Rule as "part of an overall regulatory program designed to meet a series of problems and issues." It does not identify these problems and issues, but it claims that they are similar to those that justify suspension of the benefits of employed service retirees or retirees who seek employment by registering in a hiring hall or taking out a state contractor's license. These latter provisions, of course, are not arbitrary. The Fund has a clear interest in not paying benefits to early retirees employed in the industry; they already receive a full income, and the Fund does not want them to compete for jobs with younger workers ineligible for benefits. And it is not arbitrary to cast Rule 21 so as to reach those seeking to return to work. Not all rules that reach somewhat beyond their mark are for that reason unlawful. *See Wilson v. Board of Trustees*, 564 F.2d 1299, 1302 (9th Cir. 1977).

The Fund's interest in protecting the jobs of young workers and its contribution base, however, does not require it to penalize retirees who run for the union's presidency. The union does not pay its president or contribute to his retirement benefits, so Hurn would not affect anyone's job, wage, or benefits by winning office. The Fund therefore had no reason to discourage his candidacy. Nor was Hurn any less needy than before running for office. He needed his benefits, if anything, more than before because he now had the expense of campaigning to add to his other expenses. His need for benefits during his campaign would not have been re-

duced even were the presidency a paying office.

We also find unsupported on this record the view that competition from retirees might deter other union members from seeking office. Employed workers who run for office would not lose their wages in the process, so they should not fear competition from service retirees. The only certain effect of suspension is to add to the disincentives retirees like Hurn have for seeking union office. We express no opinion on the lawfulness of a complete bar of a retiree from holding union office. *See* 29 C.F.R. sec. 451.41(a) (1982). Even if such a bar were lawful the disincentive Rule 21 is said to embody would remain arbitrary because it would bar only those who could not afford to lose their benefits. Those who could afford that loss could continue to seek and to hold union office. Such discrimination would be arbitrary. Therefore, we find the provision arbitrary and capricious under section 302(c)(5).

D. ERISA Preemption and the Taft-Hartley Act

Finally, there is no merit to the Fund's objection that we cannot reach the Taft-Harley violation because we have already validated the pension plan under ERISA's "conflicting" standards. That is not true. All that we decided in our earlier opinion was that Hurn did not meet the age requirement for the nonforfeitability standards in ERISA section 203(a). 648 F.2d at 1253-54. Section 203(a) primarily effectuates only one of Congress' goals, that of establishing "minimum standards of plan design with respect to the vesting of plan benefits." *See* H.R. Rep. No. 533, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4640.[5] We did not authorize the trustees

[5]For a summary of ERISA's other provisions, see *The Pension Reform Act of 1974: Brave New World of Retirement Security*, 27 U. Fla. L. Rev. 1004, 1064-79 (1979).

to behave arbitrarily in dispensing nonvested benefits. Had we thought otherwise we would not have remanded the case to the district court to allow Hurn to pursue his section 302(c)(5) claim.[6]

The Fund's broader argument that ERISA preempts the Taft-Harley Act on pension issues is equally untenable. Both the Supreme Court and this court have recognized that the Taft-Hartley provisions parallel the ERISA provisions and that trustees must meet the requirements of each. *See UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982); *Bricklayers' Health & Welfare Trust Fund v. Brick Masons' Health & Welfare Trust Fund*, 656 F.2d 1387, 1392, (9th Cir. 1981); *Gordon v. ILWU-PMA Benefit Funds*, 616 F.2d 433, 438 (9th Cir. 1980); *cf. NLRB v. Amax Coal Co.*, 453 U.S. 322, 332-34 (1981) (using "language and legislative history of sec. 302(c)(5) and ERISA" to define trustees' duties). Where Congress intended ERISA to repeal or supersede other laws, state or federal, it said so. *See* 29 U.S.C. sec. 1031(a), 1144(a). But it said nothing about section 302(c)(5). ERISA was not to affect any federal laws not specifically mentioned, *id.* sec. 1144(d), and it does not preempt Hurn's Taft-Hartley claim.

Summary judgment for appellee is reversed, and the case is remanded to the district court for entry of judgment consistent with this disposition.

REVERSED and REMANDED.

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[6]The district court in its second opinion advanced the view the Fund takes here, that "(T)he Rules and Regulations of Defendant Fund in issue in this case have been held not to violate the provisions of (ERISA) in *Hurn v. Retirement Fund*, etc., 648 F.2d 1252 (9th Cir. 1981)." The court construed our earlier opinion too broadly. We only held that Rule 21 did not violate sec. 203(a). We said nothing of other ERISA provisions, most notably sec. 404, 29 U.S.C. sec. 1104, the analogue to sec. 302(c)(5). We do not discuss the applicability of sec. 404, which took effect on January 1, 1975, *id.* sec. 1114(a), and carries its own limitations period, *id.* sec. 1113, because Hurn did not plead a cause of action under it.

No. 82-1325

IN THE

Supreme Court of the United States

October Term, 1983

I.A.M. NATIONAL PENSION FUND,

Petitioner,

vs.

MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,

Respondents.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated, pursuant to Rule 22.6 of this Court, wish to bring to the Court's attention a decision recently rendered by the Ninth Circuit Court of Appeals.

The case, *Music v. Western Conference of Teamsters Pension Trust Fund*, ___ F.2d ___, No. 79-4251, filed on August 2, 1983, was before the Ninth Circuit on remand by this Court for reconsideration in light of this Court's decision in *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982). *See*

Pet. 16-17. The opinion is reproduced in the Appendix to this Supplemental Brief at pages 1a-13a.

Respectfully submitted,

ROBERT D. VOGEL, a Member of
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APPENDIX.

Frank Music, Plaintiff-Appellant, vs. Western Conference of Teamsters Pension Trust Fund, Defendant-Appellee. No. 79-4251. Civ. No. C. 78-1648 RHS.

United States Court of Appeals For The Ninth Circuit.

Filed Aug. 2, 1983.

Appeal from the United States District Court for the Northern District of California.

Robert H. Schnacke, District Judge, Presiding. Argued and submitted January 15, 1981.

Before: SKOPIL, ALARCON, and BOOCHEVER, Circuit Judges. ALARCON, Circuit Judge:

Appellant Frank Music appeals from a grant of summary judgment in favor of the Western Conference of Teamsters Pension Trust Fund and the denial of his cross-motion for summary judgment. For the reasons stated below, we reverse the judgment of the district court.[1]

FACTS

Frank Music (hereinafter "Music") was a participant in the Western Conference of Teamsters Pension Trust Fund (hereinafter "Trust Fund") for approximately 20 years before he suffered a disabling heart attack on November 6, 1975, at age 47.

Music thereafter applied for federal social security disability benefits (hereinafter "federal disability"). In August of 1976, the Social Security Administration declared Music permanently disabled and therefore eligible to receive those benefits. The federal disability insurance program requires a "waiting period" of five full, consecutive calendar months

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[1]This case is before us upon remand by the Supreme Court for reconsideration in light of United Mine Workers of America Health and Retirement Fund v. Robinson, 455 U.S. 562 (1982).

between the date an applicant first becomes disabled and the applicant's "date of entitlement", upon which he or she is eligible to receive benefits. 42 U.S.C. Sec. 423(c)(2). Music was therefore declared eligible to receive federal disability benefits as of May 1, 1976, which was five full consecutive calendar months after his November heart attack. His federal disability benefits were paid retroactive to that date.

In August of 1976, Music submitted an application to the Trust Fund for disability retirement benefits (hereinafter "union disability pension.") The Trust Fund determined that Music was eligible to receive a disability pension,[2] and went about computing the amount of his monthly benefit payments.

Both at the time of Music's application for benefits and at the time of his disabling heart attack, the Pension Plan of the Western Conference of Teamsters (hereinafter "pension plan") required that a disabled employee be receiving federal disability benefits before she or he was eligible to

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[2]The Pension Plan of the Western Conference of Teamsters in effect on the date Music became disabled provided in relevant part:

> ARTICLE VII — DISABILITY RETIREMENT BENEFITS
> Section 1 — Conditions:
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> An Employee shall be eligible for a Disability Retirement Benefit, subject to the limitations of Section 6, if
>
> (a) he has not reached his 65th birthday, or retired under Article III
>
> (b) he has had at least 15 years of Unbroken Service,
>
> (c) he has been covered under the Plan for at least 2 years,
>
> (d) he is disabled and is receiving Disability Insurance Benefits under the Federal Social Security Act, and
>
> (e) Employer Contributions have been made on his account for a total of at least 3,000 Covered Hours in the 16 calendar quarters immediately preceding the calendar quarter during which he first satisfies all of conditions (a), (b), (c), and (d) above.

At the time of his disabling heart attack, Music had satisfied all of the eligibility requirements for a disability retirement benefit other than the one requiring that he be receiving federal disability benefits.

receive a union disability pension.[3] Music was therefore not eligible to receive a union disability pension until May 1, 1976, the date on which he became eligible for federal disability benefits. The Trust Fund fixed the amount of his monthly disability benefits by the terms of the pension plan in force on May 1, 1976 (hereinafter "the 1976 plan"). The plan had gone into effect on January 1, 1976.

Music, however, contended that his pension eligibility should commence on the date he became disabled, in November of 1975, and that the amount of his monthly disability benefits should be computed under the more generous terms of the pension plan in effect at the time (hereinafter "the 1975 plan").[4] The effect of the pension plan's five-month "waiting period" eligibility requirement, and thus

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[3]The Trust Fund, in its brief, has stated that this requirement actually means only that an applicant must be eligible to receive federal disability benefits, rather than actually be receiving them. See generally Fase v. Seafarers Welfare & Pension Plan, 432 F.Supp. 1037 (E.D.N.Y. 1977), aff'd 589 F.2d 112 (2d Cir. 1978). We assume that by this concession the Trust Fund has modified this requirement of the pension plan.

[4]Under the terms of the 1975 plan, a plan participant qualifying for a disability pension was entitled to monthly disability payments "equal to that . . . which the employee would have received. . . . if the employee has retired at age 65." (Stipulation as to Agreed Upon Statement of Facts 4). Under this formula, Music would have been entitled to disability retirement benefit of $533.50 per month. On July 17, 1975, however, the trustees of the Trust Fund voted to actuarily reduce the disability retirement benefits. The amendment effectuating this reduction was approved by the trustees in its final form on October 16, 1975, and its effective date was January 1, 1976. Under the modification adopted by the trustees, disability retirement benefits were made equivalent to "early retirement" benefit payments for disabled participants who are over age 55 on the effective date of their disability retirement benefits. Participants like Music who were under age 55 on the effective date of their disability retirement benefits receive 55 percent of their normal age 65 retirement benefit. Under this plan, Music's full retirement benefit of $533.50 was actuarily reduced to $317.50.

It should be noted here that Music does not allege that he had inadequate notice of the trustees' action lowering benefit amounts, nor does he claim that the trustees' decision to reduce the amounts of disability benefit was arbitrary or unreasonable.

the question of which benefits Music is entitled to, are the sole issues in this case.[5]

DISCUSSION

Jurisdiction and Standard of Review

Music brought this action under Sec. 302 of the Labor Management Relations Act, 29 U.S.C. Sec. 186 (LMRA), and Sec. 404 of the Employee Retirement Income Security Act Sec. 29 U.S.C. 1104 (ERISA).

Section 302 of the LMRA (29 U.S.C. Sec. 186) contains a general prohibition against employers making payments of money "or other things of value" to union representatives. Section 302(c)(5), however, sets forth an exception to this general prohibition for payments made to an employee welfare or pension fund. Under Sec. 302(c)(5), the general prohibition of Sec. 302 does not apply "with respect to money or other things of value paid to a trust fund established . . . for the sole and exclusive benefits of the employees of such employer, and their families and dependents . . ." Sec. 302(c)(5), (emphasis added). Thus, under Sec. 302(c)(5), a pension trust fund must be operated "for the sole and exclusive benefit of the employees." Sailer v. Retirement Fund Trust, 599 F.2d 913, 914 (9th Cir. 1979).

We have repeatedly emphasized that although Sec. 302(e) grants district courts jurisdiction to determine whether the provisions of a given retirement fund constitute a structural

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[5]Neither the 1975 plan nor the 1976 plan specifically requires that an applicant wait five months for a union disability pension. The five-month waiting period is a specific eligibility requirement only for federal disability benefits. Nevertheless, because an applicant must qualify for federal disability benefits in order to qualify for a union disability pension, the five-month waiting period is union disability pension, the five-month waiting period is de facto an eligibility requirement for a union disability pension, and will be treated as such in this opinion.

defect in violation of Sec. 302(c)(5), that section does not confer general powers to interfere with the day to day fiduciary administration of welfare and pension trust funds. See Ponce v. Construction Laborers Pension Trust, 628 F.2d 537, 541 (9th Cir. 1980); Wilson v. Board of Trustees, Etc., 564 F.2d 1299, 1300 (9th Cir. 1977); Burroughs v. Board of Trustees of Pension Trust, Etc., 542 F.2d 1128, 1130 (9th Cir.), cert. denied, 429 U.S. 1096 (1977).

When pension trustees acting under the authority of the trust fund arbitrarily and capriciously deny pensions to employees a structural defect exists. Ponce, 628 F.2d at 541. Such arbitrary and capricious conduct is structually deficient because it is deemed not to be for the sole and exclusive benefit of the employees.[6] Id. at 541-42.

Section 302(c)(5) which requires trustees to act for the "sole and exclusive benefit of the employees" imposes on trustees the burden of fiduciary care as defined on traditional equitable principles. NLRB v. Amax Coal Co., 453 U.S. 322, 330 (1981). Thus, "a trustee bears an unwavering duty of complete loyalty to the beneficiary to the trust, to the exclusion of the interests all other parties", id., at 329. This rule against divided loyalties must be enforced with "uncompromising rigidity." Id. at 329-330.

In United States Mine Workers, Etc. v. Robinson, 455 U.S. 562 (1982), where the Supreme Court found that ben-

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[6]In the typical case, the challenged eligibility requirement operates to deny the employee a pension altogether. See e.g., Ponce v. Const. Laborers Pension Trust, 628 F.2d 537 (9th Cir. 1980); Sailer v. Retirement Fund Trust, 599 F.2d 913 (9th Cir. 1979); Wilson v. Board of Trustees, 564 F.2d 1299 (9th Cir. 1977); Giler v. Board of Trustees, 509 F.2d 848 (9th Cir. 1975). In the instant case, the eligibility requirement challenged by Music operated only to reduce the amount of his pension, but does not make him ineligible for a pension. Neither Music nor the Trust Fund suggests, however, that Music's claim does not involve an alleged "structural" deficiency in the pension plan.

efits determined in collective bargaining can be overturned only if they are in violation of another federal law, the Court also held that the sole and exclusive benefit provision of Sec. 302(c)(5) "is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents to the exclusion of all others." Id. at 570.

While holding that Sec. 302(c)(5) did not authorize federal courts to review for reasonableness the provisions of collective bargaining agreements which fix eligibility rules for an employee benefit trust fund, the Court was careful to draw a distinction between cases like Robinson which involved collective bargaining and those where changes in eligibility levels were made unilaterally by the trustees of the fund. The Court recognized that in the latter type of cases:

> The Court of Appeals has held . . . "that the Trustees have full authority . . . with respect to questions of coverage and eligibility' and that the court's role is limited to ascertaining whether the Trustee's broad discretion has been abused by the adoption of arbitrary or capricious standards." Noting that "(t)he institutional arrangements creating this Fund and specifying the purposes to which it is to be devoted are cast expressly in fiduciary form," the court stated that "the Trustees, like all fiduciaries, are subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run."

(Citations omitted). Id. at 573.

Quoting NLRB v. Amax Coal Co., 453 U.S. 322 (1981), the Court also iterated that in enacting Sec. 302(c)(5), "Congress intended to impose on trustees traditional fiduciary duties." 455 U.S. at 573 n. 12. The Court, however,

left unanswered the question whether federal courts are authorized to enforce those duties. Id.

Although "it would be anamolous to conclude that Sec. 302(c)(5) imposed fiduciary obligations on trustees but that federal courts were powerless to enforce them, Dudo v. Schaffer, 551 F.Supp. 1330, 1338 (E. Penn. 1982), accord Hurn v. Retirement Fund Trust, 703 F.2d 386 (9th Cir. 1983), we also need not resolve that issue. In Robinson, the Court stated that the "substantive terms of jointly administered employee benefit plans must comply with the detailed and comprehensive standards of ERISA." 355 U.S. at 575. In NLRB v. Amax Coal Co., the Court had previously recognized that "ERISA essentially codified the strict fiduciary standards that a Sec. 302(c)(5) trustee must meet." 453 U.S. at 332. Thus, the fiduciary provisions of Sec. 404 of ERISA, 20 U.S.C. Sec. 1104, are applicable to the trustees actions in this case. Under Sec. 404(a)(1) a fiduciary must discharge his or her duties with respect to the plan "solely on the interest of the participants and beneficaries and (A) for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan. We therefore, have jurisdiction under 29 U.S.C. Sec. 1132. See Elser v. I.A.M. National Pension Fund, 684 F.2d 648 (9th Cir. 1982), petition for cert. filed, 51 U.S.L.W. 3614, U.S. Fed. 8, 1983) (No. 82-1325).

This court has recognized that trustees must have broad discretion in fashioning eligibility requirements for pensions and that judicial intervention is appropriate only where the trustees' actions in fashioning or applying those eligibility requirements do not have a reasonable basis or are arbitrary and capricious. See Ponce, 628 F.2d 541-42; Sailer v. Retirement Fund Trust, 599 F.2d 913, 914 (9th Cir. 1979).

We have previously recognized that Trustees' actions are subject to the same standard of review under ERISA fiduciary obligations as they are under the LMRA. Elser, 684 F.2d at 654; Fentron Industries v. National Shopmen Pension Fund, 674 F.2d 1300, 1307 (9th Cir. 1982); Gordon v. ILWU-PMA Benefit Fund, 616 F.2d 433, 438 (9th Cir. 1978). Under that standard trustees decisions "may be reversed only where they are arbitrary, capricious or made in bad faith, not supported by substantial evidence, or erroneous on a question of law." Elser, 684 F.2d at 655 quoting Rehmar v. Smith, 555 F.2d 1362, 1371 (9th Cir. 1976.)

THE REASONABLENESS OF
THE "WAITING PERIOD" REQUIREMENT

The five-month delay which is the basis of Music's complaint results directly from the pension plan's requirement that an employee be eligible for federal disability benefits in order to qualify for a union disability pension. Similar provisions have been the subject of litigation in this Circuit before.[7] The issue framed by Music here, however, is a relatively narrow one.[8] Music's sole contention is that his eligibility for a union disability pension should commence on the date he suffered his disabling injury, not five months later. In addition, according to Music, the benefit amount to which he is entitled should be computed under the terms

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[7]See Burroughs v. Bd. of Trustees, 398 F.Supp. 168 (N.D. Cal. 975), aff'd 542 F.2d 1128 (9th Cir.), cert. denied, 429 U.S. 1096 (1977); Nudo v. Western Conference of Teamsters, No. S-77-365 (E.D. Cal. Nov. 13, 1978), CCH Pension Plan Guild Tranfer Binder, April, 1975-April, 1979 22,587 (1979). See also Blazquez v. New York City District Council, 463 F.Supp. 727 (S.D.N.Y. 1979); Fase v. Seafarers Welfare & Pension Plan, 432 F.Supp. 1037, (E.D.N.Y. 1977), aff'd 589 F.2d 12 (2d Cir. 1978).

[8]Music does not argue, for example, that requiring an applicant to qualify for federal disability benefits in order to qualify for a union liability pension is itself arbitrary and capricious on its face. Nor does he challenge the pension plan's right to rely on federal disability's medical determination of permanent disability.

of the pension plan in effect on the date he suffered his disabling injury, not under the terms of the pension plan in effect on the date he qualified for federal disability benefits five months later.

The burden is initially on the plaintiff to show that the eligibility requirement under consideration in unreasonable or is "arbitrary and capricious." Once that showing is made, however, the burden shifts to the trustees of the Trust Fund to come forward with evidence establishing the reasonableness of the eligibility requirement, based on the purposes of the fund. Roark v. Lewis, 401 F.2d 425, 428 (D.C. Cir. 1968).

The Trust Fund concedes that "(t)he only date that is important for plan eligibility purposes is the effective date of qualification for Social Security benefits; the date that applicant suffered his heart attack has no significance under the Plan's eligibility scheme." In our view, Music has carried his initial burden of demonstrating that this is arbitrary and capricious.

One of the major purposes of the disability retirement pension, as evidenced by the terms of the pension plan, is to provide financial benefits for permanently disabled, long term employees who are not yet eligible for the other pension benefits, and on whose behalf substantial contributions have been made to the Trust Fund. Each of the other eligibility requirements for a disability pension in both the 1975 and 1976 plans[9] is specifically related to that purpose. The five-

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[9]The 1976 Plan provides in relevant part:
ARTICLE VI — DISABILITY RETIREMENT BENEFITS Section 1 — Conditions:

> A vested Participant or Age Pensioner shall be eligible for a Disability Retirement Benefit, subject to the limitations of Section 3, if (a) he has not reached his 65th birthday, (b) he is receiving Disability Insurance Benefits under the Federal Social Security Act, and (c) he has been credited with a total of at least 3,000 Covered Hours in the calender year in which he first satisfies all of the conditions above and in the four preceding calender years.

The term "covered hour" means an hour of employment of an employee of which an employer contribution is paid on his account into the trust fund. See 1976 Plan, Art. I, Sec. 12.

The relevant terms of the 1975 plan are set forth in note 1, supra.

month waiting period, by contrast, bears no apparent rational relationship to that purpose. It is difficult to see, at least prima facie, how delaying the eligibility of a permanently disabled applicant who satisfies every other eligibility requirement serves any of the purposes of the disability pension set forth above. In our view, where a plan participant satisfies the other eligibility requirements for a disability pension, including the age, length of service, and employer contribution requirements, that participant has a right to receive a disability pension which vests immediately when that participant becomes permanently disabled. It may be that commencement of the benefits to which a disabled participant has earned the right can reasonably be delayed for five months after the date of the disabling injury. Nevertheless, it is the occurrence of the disabling injury which ultimately and fundamentally establishes the participant's right to the disability benefits which are ultimately paid. Prima facie, it seems unreasonable to fix inception of a participant's right to benefits on any date other than the one on which the final event ultimately providing the grounds for a successful claim for benefits has occurred.

The Trust Fund offers three arguments in support of delaying an applicant's eligibility until the five-month waiting period has passed. First, it argues that a five-month waiting period is necessary to confirm that the disability under consideration is permanent. The waiting period thus performs an evidentiary role in the determination of disability — it assists in sorting permanent disabilities out from those which are only temporary.[10]

This argument is not persuasive. The Trust Fund offers no reasons for transforming a waiting period which serves

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[10]This is the rationale put forward in the legislative history of a provision in the Social Security Act. See H. Rep. No. 1189, 84th Cong. 1st Sess. 6 (1955).

an evidentiary function into an eligibility requirement. Music does not deny that it may be sound medical practice to delay the final determination of permanent disability for some reasonable period after the injury occurs. He argues, rather, that an applicant's eligibility should be retroactive to the date of the disabling injury, the permanence of which is mere confirmed by the waiting period.[11] The Trust Funds argument does not address that issue.

Secondly, the Trust Fund claims that the Trust Fund would incur increased administrative costs if the Trust Fund were not permitted to rely on the five-month waiting period. We are told that the Trust Fund, for example, would be forced to conduct its own investigation into when a worker became injured, into whether subsequent events caused the disability, and into "other matters pertinent to a determination of when the applicant became 'disabled.' . . ." This argument is not convincing. The Trust Fund is presently presupposing that the injury occurring five months earlier, not some later one, caused the disability. As conceded by appellee in its first argument, supra, the Trust Fund presently relies on the five-month waiting period to confirm the permanence of that earlier injury. As noted above, Music concedes that the pension plan can delay determination of the employee's eligibility while the medical determination of the injury's permanence is being made, but insists that eligibility should be retroactive to the date the disabling injury occurred once that determination has been made. The Trust Fund has not explained how making eligibility retroactive to the date the

[11]For purposes of this appeal, we assume that the "date of the disabling injury" is that used by the Social Security Administration in determining an applicant's "date of entitlement." The "date of entitlement," as noted earlier, is fixed after five consecutive calendar months "throughout which the individual . . . has been under a disability . . ." 42 U.S.C. Sec. 423(c)(2)(A).

disabling injury occurred would impose any additional administrative burden on them.

Finally, the Trust Fund argues that the plan's reliance on the five-month waiting period "recognizes that most individuals receive temporary disability payments from their health and welfare plans or other insurance during this five-month interim." While the thrust of this argument is not completely clear, the Trust Fund is perhaps contending that delaying payment of disability pension benefits is reasonable because it would enhance that actuarial soundness of the pension plan.[12] The Trust Fund might further suggest that such a policy is not at odds with the purpose of the pension plan, since affected workers receive income from other sources during that period.

We do not find this argument persuasive. Music is not arguing that he is entitled to disability benefits for the five-month period immediately following his disabling injury; indeed, Music's counsel made quite clear at oral argument that Music is not seeking any benefits for that five-month period.[13] Music is arguing only that his eligibility for benefits should be fixed as of the date of his disabling injury for purposes of determining whether he is covered under the 1975 plan or under the 1976 plan. The Trust Fund's argument does not address that issue.

The Trust Fund has demonstrated no reasonable justification for delaying Music's eligibility for a disability pen-

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[12] See generally, Tomlin v. Board of Trustees, 586 F.2d 148 (9th Cir. 1978); Wilson v. Board of Trustees, 564 F.2d 1299 (9th Cir. 1977).

[13] Thus, the issue of whether the Trust Fund might reasonably delay commencement of benefits for 5 months, or might offset the union disability benefits for those five months by the amount of other benefits received from other sources, is not before us.

sion for five months after the date of his disabling injury. Music should therefore be deemed eligible for his pension as of November 6, 1975 and his benefits computed under the rate fixed by the 1975 plan.[14]

REVERSED.

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[14]We are mindful of the fact that under the 1976 plan, disability benefits payable to plan participants who are 55 or over on the "effective date of their disability retirement benefits" are payable at a somewhat higher rate than similar benefits for participants who are under age 55 on the "effective date of their disability retirement benefits." 1976 Plan, Art. VI, Sec. 2 The question may arise as to whether the "effective date of disability retirement benefits" for purposes of this provision should be considered the actual date of the disabling injury, as in this case, or the effective date of the actual payments, which under the 1976 plan is some five months later. That particular issue was not presented by this case, and we do not address it here.

No. 82-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

I.A.M. NATIONAL PENSION FUND,
Petitioner,
v.

MADGE H. ELSER AND MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ARGUMENT

1. Respondents appear principally to contend (Opp. 4-5) that certiorari should be denied because the decision below is independently supportable on two grounds relied upon by the district court and not reviewed in the court of appeals. In the context of this case, however, the argument makes absolutely no sense.[1] It is, of course, true

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[1] Also nonsensical is respondents' newly raised assertion (Opp. 5) that the court of appeals decision is independently supportable because the Fund's cancellation of their past service credits

> violated Section 203(c)(1)(B) of ERISA, 29 U.S.C. § 1053 (c)(1)(B), in that by cancelling Respondents' past service credit, the Petitioner divested the Respondents of a vested pen-

that review by this Court may not be appropriate where the decision of which review is sought was based upon several independent or alternative rationales, not all of which are challenged by the petition for certiorari. Thus, the Court will ordinarily decline review where it appears that the issues sought to be raised would not be reached in this Court if review were granted.[2] That, however, is hardly this case.

As the Fund's petition demonstrated, the decision below rested entirely upon an analysis of the jurisdictional reach of LMRA § 302(c)(5) which is squarely in conflict with this Court's decision in *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982). Similarly the district court's disposition of the case turned upon its erroneous resolution of the same central legal issue. That issue is the intended scope of federal court jurisdiction to scrutinize for "reasonableness"—and modify—pension eligibility standards established by the trustees. Both courts below exercised virtually plenary power to superintend the Fund Trus-

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sion without first affording them the statutory 203(c)(1)(B) option.

The assertion is unsupported by references either to the record or decisions below, or to any controlling legal authority.

As respondents are surely aware, ERISA § 203(c)(1)(B) plainly has no pertinence here. The "option" prescribed by that provision is required only if a plan is amended in a way which changes the previously-adopted vesting schedule. No such amendment occurred in this case, however; the vesting and past service cancellation provisions in Plan A were, in all respects here pertinent, unchanged throughout the entire period of Waste King's participation as a contributing employer in the Fund. Respondents' reliance on such mere gossamer as this fanciful contention clearly is unavailing.

[2] *E.g.*, *Cichos v. Indiana*, 385 U.S. 76 (1966); *Hodges v. United States*, 368 U.S. 139 (1961); *see* R. Stern & E. Gressman, *Supreme Court Practice* 272, 490 (5th ed. 1978); *cf. Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

tees' design and implementation of the Plan A eligibility rules. It is to review and correct those actions that the Fund seeks this Court's review.[3]

2. Respondents' assertion (Opp. 5, n. 4) that "the circuit court's holding turns upon its own set of unique facts and will affect few if any litigants other than those involved in this proceeding" is betrayed as fatuous, both by the conspicuous absence of any identification of "unique facts,"[4] and by respondents' own recitation (Opp. 9-10) of the dire consequences which will, in their judgment, result from reversal of the decision below. Clearly, respondents do not believe that the "unique facts" of this case would limit the impact of this Court's reversal of the decision to these litigants. On the contrary, respondents cry in alarm that reversal would result in the demise of the

> arbitrary and capricious standard of review in evaluating trustee conduct under Section 302 of the LMRA and ERISA [and] allow trustees to act whimsically, arbitrarily and capriciously in disbursing pension contributions as long as the compensation is received by *any* participant or beneficiary of the plan without any judicial supervision or intervention whatsoever!

(Opp. 9). Stripped of its pejorative tone, respondents' characterization of the result of a reversal here is quite correct: it *would* permit trustees to prescribe eligibility rules which meet specific ERISA requirements without

[3] Even if it were true that the result reached in the court below might not ultimately change on remand after a reversal by this Court, certiorari would nevertheless be appropriate because the issue presented on the petition is one of major importance in the continuing development of ERISA law, on which the decision below will serve as precedent unless corrected by this Court. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 535, n. 14 (1975); text at 4, n. 5, *infra*.

[4] Respondents apparently adopt as their own the summary of facts contained in the court of appeals opinion (Opp. 3). Nothing in that opinion suggests, however, that the court believed the facts to be "unique," or the issues to be of limited importance.

"any restriction on the allocation of the funds among the persons protected by § 302(c)(5)." *Robinson*, 455 U.S. at 572. It is precisely because *Robinson* mandates that result that we have urged the Court to grant certiorari and reverse the decision below.

3. Finally, respondents claim that the decision below is fully in harmony with *Robinson*. Once again, however, respondents' own description of the substantive standards governing Section 302(c)(5) review, which the court below adopted to define the scope of review available under ERISA § 404, belies their argument and instead graphically demonstrates the conflict between the decisions. Thus, notwithstanding the *Robinson* holding that the statutory language of Section 302(c)(5) imposes no "reasonableness requirement," respondents describe that statute as permitting forfeiture of past service credit "*under reasonable circumstances*" (Opp. 8). They claim further that ERISA § 404 merely carried forward the preexisting rule permitting such past service cancellation "*as long as it was reasonable under the circumstances*" (Opp. 8), and that Section 404 thus empowers the federal courts to insure "that trustees act *reasonably* and *equitably* in making pension eligibility determinations" (Opp. 10) (emphasis added). The assertion (Opp. 9) that the Fund has cited "no case authority for a contrary conclusion" inexplicably fails to account for our prominent and repeated citation of *Robinson*.

CONCLUSION

Far from demonstrating persuasive reasons for denying the Fund's petition, respondents' opposition further demonstrates both the irreconcilable conflict between the decision below and *Robinson*, and the importance of obtaining the authoritative resolution of that conflict which only this Court can provide.[5] The Fund therefore re-

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[5] The Sixth Circuit has joined the Ninth Circuit in restricting the application of *Robinson* to collectively bargained eligibility de-

spectfully repeats its request that its petition for writ of certiorari be granted.

Respectfully submitted,

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March 23, 1983

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terminations. *Sellers v. O'Connell*, No. 81-5829 (6th Cir. Feb. 28, 1983). The *Sellers* decision highlights the significance to the development of federal employee benefit law of the issue which this petition raises. There the court refused to hold that "*Robinson* governs trust fund rules formulated by trustees as well as those included in collectively bargained agreements" "absent a clear indication" from this Court that it should (slip op. at 3). Several district courts have taken a similarly limited view of the impact of *Robinson*. *Street v. Huge*, 555 F. Supp. 357 (W.D. Va. 1983); *Kozlesky v. Board of Trustees*, 546 F. Supp. 466 (E.D. Mich. 1982); *Short v. United Mine Workers of America 1950 Pension Trust*, No. 82-2180 (D.D.C. Jan. 28, 1983) (citing the Ninth Circuit's decision in *Elser* with approval).

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's decision, that the terms of an employee pension plan are subject to judicial review for "reasonableness" under Section 404(a)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), is in conflict with the Supreme Court's decision in *United Mine Workers of America Health & Retirement Funds v. Robinson.*

2. Whether the Ninth Circuit's decision, that the terms of an employee pension plan are subject to judicial review for "reasonableness" under Section 404(a)(1) of ERISA, misconstrues Section 404(a)(1) of ERISA.

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No. 82-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

I. A. M. NATIONAL PENSION FUND,

Petitioner,

v.

MADGE H. ELSER AND MARGARET E. THOMAS,

individually and on behalf of all others similarly situated,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

Amicus curiae is the Board of Trustees of the United Mine Workers of America ("UMWA") Health and Retirement Funds ("Funds"). The Funds is a collective reference to four irrevocable trust funds established by the UMWA and the Bituminous Coal Operators' Association, Inc., in the National Bituminous Coal Wage Agreement of 1974, and carried forward by the National Bituminous Coal Wage Agreements of 1978 and 1981, pursuant to and within the scope of Section 302(c)(5) of the Labor-Management Relations Act, 1947 (the "Taft-Hartley Act"), 29 U.S.C. §186(c)(5) (1976 & Supp. V 1981). The Funds consists of two pension plans, the UMWA 1950 and 1974 Pension Plans, and two welfare plans, the UMWA 1950 and 1974 Benefit Plans. The four plans are

employee benefit plans within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1002(3).

Last Term, the Trustees of the 1950 Benefit Plan petitioned for certiorari to review a decision of the District of Columbia Circuit that eligibility rules of employee benefit plans must meet a standard of "reasonableness," purportedly derived from Section 302(c)(5) of the Taft-Hartley Act. *Robinson v. United Mine Workers of America Health and Retirement Funds*, 640 F.2d 416 (D.C. Cir. 1981). The Supreme Court unanimously reversed the District of Columbia Circuit in *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982), and held that eligibility rules are not subject to judicial review under "an undefined standard of reasonableness," because no such standard is imposed by the Taft-Hartley Act or by any other federal statute. 455 U.S. at 570, 574. Such rules must only meet the "detailed and comprehensive" requirements of ERISA. 455 U.S. at 576.

The Ninth Circuit, however, has concluded that Section 404(a)(1) of ERISA, 29 U.S.C. §1104(a)(1), does require eligibility rules to withstand judicial review under a standard of "reasonableness," even if the rule in question is consistent with the detailed requirements of ERISA. *Elser v. IAM National Pension Fund*, 684 F.2d 648 (9th Cir. 1982). If the Ninth Circuit's decision is allowed to stand, federal courts would be authorized to review and rewrite pension eligibility rules to accord with their own subjective standards of reasonableness. Indeed, they might do so, as the Ninth Circuit has done, even if the rules are specifically authorized by the detailed requirements of ERISA. Thus, federal courts would be free to substitute their judgment of proper pension policy for that of plan sponsors and Congress.

STATUTES INVOLVED

Section 302 of the Labor-Management Relations Act, 1947, as amended, 29 U.S.C. §186 (1976 & Supp. V 1981), provides in relevant part

(a) It shall be unlawful for any employer . . . to pay, lend, or deliver, or agree to pay, lend, or deliver any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

* * *

(c) The provisions of this section shall not be applicable . . .

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of

the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities . . . .

* * *

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, . . . to restrain violations of this section . . . .

Section 404(a) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1104(a) (1976 & Supp. V 1981), provides in relevant part

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

Section 401(a) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. §401(a) (1976 & Supp. V 1981) provides in relevant part

> A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—
>
> * * *
>
> (2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries . . . .

STATEMENT OF THE CASE

Petitioner, the IAM National Pension Fund (the "Fund"), is a joint-board employee benefit fund within the scope of Section 302(c)(5) of the Taft-Hartley Act, 29 U.S.C. §186(c)(5), and an employee pension benefit plan as meant by Section 3(2) of ERISA, 29 U.S.C. §1002(2) (App. 12).*

* "(App. ____)" refers to the Appendix to the Petition for Writ of Certiorari filed by the IAM National Pension Fund.

The rules of the Fund, adopted by its trustees and known as Benefit Plan A (the "Plan"), provide, consistent with Section 203(b)(2)(A) of ERISA, 29 U.S.C. §1053(b)(2)(A), that an employee must have ten years of "credited service" to vest in a pension. Although an employee vests in a pension after ten years of credited service, payments do not begin until he attains fifty years of age (App. 15).

Credited service may consist of both "past" and "future" service. "Future" service is defined as service with an employer that is obligated to contribute to the Fund under an applicable collective bargaining agreement. "Past" service is defined as service with such an employer before its obligation to contribute arose (App. 14-15).

"Future" service is credited under all circumstances. However, Article IX, Section 4 of the Plan provides for cancellation of all past service credit acquired by employees of employers who cease to have an obligation to contribute to the Fund but remain in business (App. 15). Excepted from the cancellation of past service credit are those employees who were already receiving pensions or who had left their employment more than 24 months before, or within 30 days after, the date on which their employer ceased to have an obligation to contribute to the Fund. The Plan also allows the reinstatement of past service credit for employees who earn at least five more years of future service credit within eight years of the date on which their employer ceased to have an obligation to contribute to the Fund. (App. 15-16.)

Waste King Corporation ("Waste King") began contributing to the Fund on January 1, 1969, pursuant to a collective bargaining agreement with the International Association of Machinists and Aerospace Workers, AFL-CIO (the "Union"). On January 31, 1975, Waste King's collective bargaining agreement expired, and one month later its employees voted to decertify the Union. (App. 13.) Thereafter, Waste King no longer had an obligation to contribute to the Fund although the Company continued in business (App. 16).

Respondents Madge Elser ("Elser") and Margaret Thomas ("Thomas") both were employed by Waste King for at least ten consecutive years at the time the Company ceased to have an obligation to contribute to the Fund on January 31, 1975 (App. 12). Elser and Thomas had only six years of future service credit at that time. The remaining four years were past service credit. (App. 30.)

Thomas terminated her employment with Waste King in August, 1975, and applied for a pension shortly thereafter. As a result of the cancellation of her past service credit, she did not have ten years of credited service, and her application was denied. Elser terminated her employment in October, 1977, and subsequently was denied a pension for the same reason. (App. 13-14.)

On June 30, 1978, Elser and Thomas brought an action against the Fund in the United States District Court for the Central District of California, on behalf of themselves and a class of similarly situated persons. They alleged that the cancellation of "past" service was unreasonable in violation of Section 302(c)(5) of the Taft-Hartley Act and Section 404(a)(1) of ERISA.

Upon submission on a stipulated record, the District Court entered judgment in favor of the class. In a memorandum opinion, the District Court found that the cancellation provision was unreasonable and therefore in violation of Section 302(c)(5) of the Taft-Hartley Act and Section 404(a)(1) of ERISA. The Court concluded that the provision violated Section 302(c)(5) of the Taft-Hartley Act because it did not operate for the "sole and exclusive benefit of the employees." 29 U.S.C. §186(c)(5). And the Court concluded that the provision violated Section 404(a)(1) of ERISA because it did not operate "solely in the interest of the participants." 29 U.S.C. §1104(a)(1). In this regard, the District Court noted that ERISA expressly "permits a . . . plan to provide for the cancellation of past service credit upon an employer's cessation of contributions." Nevertheless, the Court concluded that a plan provision which accomplishes that result must

still "meet the standard under ERISA" of "reasonable[ness] under the circumstances." (App. 8.)

The Fund appealed to the United States Court of Appeals for the Ninth Circuit and the Ninth Circuit affirmed. In an opinion filed on August 20, 1982, the Ninth Circuit acknowledged that the Supreme Court recently decided that the "sole and exclusive benefit" provision of Section 302(c)(5) of the Taft-Hartley Act "hardly embodies [a] reasonableness requirement. Its plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others." *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. at 570.

The Ninth Circuit noted, however, that the disputed plan provision in *Robinson* was the product of collective bargaining. The cancellation provision in this case, on the other hand, was adopted by trustees. For this reason, the Ninth Circuit speculated that the decision in *Robinson* might not be dispositive, and that a provision adopted by trustees might still be reviewed for reasonableness under the "sole and exclusive benefit" provision in Section 302(c)(5) of the Taft-Hartley Act. In the view of the Ninth Circuit, however, it was unnecessary to consider whether Section 302(c)(5) has any continued vitality in this respect, because Section 404(a)(1) of ERISA, which requires trustees to act "solely in the interest" of participants, embodies a reasonableness requirement. And, because the Fund had failed "to meet its burden of showing a reasonable relationship between the cancellation provisions and the purpose of the fund," the Ninth Circuit concluded that those provisions were unreasonable and, therefore, in violation of Section 404(a)(1) of ERISA. (App. 28-46.)

The Fund petitioned the Ninth Circuit for a rehearing and a rehearing *en banc*. The Ninth Circuit denied the petition for rehearing and rejected the suggestion for a rehearing *en*

banc on November 10, 1982. The Fund's petition for a writ of certiorari followed. Amicus curiae supports the Fund's petition.

SUMMARY OF ARGUMENT

The Ninth Circuit decided that the requirement in Section 404(a)(1) of ERISA that employee benefit plans be administered "solely in the interest of . . . participants" and for the "exclusive purpose" of providing benefits to those participants imposes a standard of reasonableness pursuant to which federal courts may review and revise plan eligibility provisions. The decision of the Ninth Circuit directly conflicts with the decision of this Court in *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982). In *Robinson*, this Court stated, in addressing the "sole and exclusive benefit" rule of Section 302(c)(5) of the Taft-Hartley Act, that "[t]here is no general requirement that the complex schedule of . . . employee benefits must withstand judicial review under an undefined standard of reasonableness." 455 U.S. at 574.

Moreover, the decision of the Ninth Circuit misconstrues Section 404(a)(1) of ERISA, 29 U.S.C. §1104(a)(1). Section 404(a)(1) of ERISA requires a pension plan trustee to administer the plan and its assets for the exclusive benefit of plan participants and beneficiaries. The "exclusive benefit" rule in Section 404(a)(1) does not authorize judicial review of plan provisions allocating assets among eligible beneficiaries. Rather, the rule simply reflects a longstanding requirement, originating in federal tax law, that pension plan assets must not accrue to the benefit of employers or any party other than plan participants. Absent a violation of this requirement, however, pension plan provisions are not subject to challenge under Section 404(a)(1) of ERISA. Of course, pension plans are subject to review for a violation of the minimum standards set forth in ERISA.

ERISA sets forth detailed and comprehensive standards that a pension plan must satisfy. These standards govern

vesting, participation, and funding; reporting and disclosure; and fiduciary conduct. 29 U.S.C. §§1021-1132. A pension plan that conforms with these standards in ERISA, and other federal law, is not subject to review and revision by federal courts.

The IAM Fund contains a vesting standard that is explicitly authorized by Section 3(37) of ERISA, 29 U.S.C. §1002(37). The Ninth Circuit ignored Section 3(37) of ERISA, disregarded prior decisions of this Court, and erroneously concluded that Section 404(a)(1) of ERISA allowed the review and revision of the vesting standard because it was unreasonable. Therefore, the IAM Fund's petition for a writ of certiorari should be granted.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit, that the terms of an employee pension plan are subject to judicial review for "reasonableness" under Section 404(a)(1) of ERISA, is in conflict with the Supreme Court's decision in United Mine Workers of America Health & Retirement Funds v. Robinson, and misconstrues Section 404(a)(1) of ERISA.

Section 302 of the Taft-Hartley Act makes it unlawful for an employer to make payments to a labor organization that represents its employees, except where, *inter alia*, the payments are made to a trust fund that satisfies the requirements in Section 302(c)(5). 29 U.S.C. §186(a),(c)(5). Section 302(c)(5) requires, among other things, that the trust fund be used "for the sole and exclusive benefit of the employees" of contributing employers. 29 U.S.C. §186(c)(5).[1] Where the fund is used otherwise, federal courts have decided that they have jurisdiction under Section 302(e) to restrain

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[1] Among the other requirements, employer payments must be held in trust and used only to pay certain types of benefits; the basis of such payments must be set forth in a written agreement with the employer; and the employees and the employers must be equally represented in the administration of the trust. 29 U.S.C. §186(c)(5)(A),(B).

such use as a violation of Section 302.[2] *See In re Typo-Publishers Outside Tape Fund*, 478 F.2d 374 (2d Cir.), *cert. denied sub nom. Christensen v. New York Times Company*, 414 U.S. 1002 (1973); *Blassie v. Kroger Company*, 345 F.2d 58 (8th Cir. 1965). *Compare Haley v. Palatnik*, 509 F.2d 1038 (2d Cir. 1975) *with Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968).

Other federal courts have decided, however, that they have jurisdiction to review the allocation of funds among eligible beneficiaries, *i.e.*, employees of contributing employers, by virtue of Section 302(c)(5) of the Taft-Hartley Act. These courts have held that unreasonable eligibility provisions constitute a violation of the "sole and exclusive benefit" provision in Section 302(c)(5), and may be restrained under Section 302(e). *See, e.g., Ponce v. Construction Laborers Trust*, 628 F.2d 537 (9th Cir. 1980); *Knauss v. Gorman*, 583 F.2d 82 (3d Cir. 1978).

Last term, however, the Supreme Court held in *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, that the "sole and exclusive benefit" provision "hardly embodies [a] reasonableness requirement" that would authorize judicial review and modification of pension eligibility rules. 455 U.S. at 570. Rather, "[i]ts plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees, . . . to the exclusion of all others." *Id.* In reaching this conclusion, the Court relied on the legislative history of Section 302, and the specific conditions set forth in Section 302(c)(5)(A) and (B). 455 U.S. at 571-72. According to the Court, "[e]ach of the specific conditions . . . is consistent with the nondiversion purpose" of the statute, and together they "fortify the basic requirement that employer contributions be administered for the sole and exclusive benefit of employees." 455 U.S. at 572. The Court concluded, therefore, that

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[2] Subsection (e) of Section 302 provides that federal courts have authority "to restrain violations" of Section 302. 29 U.S.C. §186(e).

"[n]one of the conditions places any restriction on the allocation of the funds among the persons protected by §302(c)(5)." *Id.*

Nor does any other federal statute impose a "reasonableness" requirement, according to the Supreme Court. *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. at 574. Indeed, the Court stated that "[t]here is no general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness." *Id.* Therefore, assuming an employee benefit plan does not violate the "detailed and comprehensive standards of . . . ERISA" or some other Act of Congress, such as the Civil Rights Act of 1964, federal courts have no general authority to review eligibility rules in the plan. 455 U.S. at 575 and n. 15.

In this case, however, the Ninth Circuit noted that the disputed plan provision in *Robinson* was the product of collective bargaining. The plan provision in this case, on the other hand, was adopted by trustees. Therefore, the Ninth Circuit speculated that the decision in *Robinson* might not be dispositive, and that a provision adopted by trustees may still be reviewed for reasonableness under the "sole and exclusive benefit" provision in Section 302(c)(5) of the Taft-Hartley Act.

Earlier this Term, however, the Supreme Court made it clear that the manner in which a plan provision is adopted is without significance. In *Music v. Western Conference of Teamsters*, 660 F.2d 400 (9th Cir. 1981), the Ninth Circuit declared that a pension plan provision adopted by trustees was "unreasonable" and, therefore, in violation of Section 302(c)(5) of the Taft-Hartley Act. 660 F.2d at 402 nn. 2-3. The trustees petitioned for certiorari and the Supreme Court granted the writ, summarily vacated the judgment of the Ninth Circuit, and remanded the case for further consideration in light of the principles announced in *Robinson*. *See Western Conference of Teamsters Pension Trust Fund v. Music*, 459 U.S. ____, 103 S.Ct. ____, 74 L.Ed.2d 48 (1982).

In this case, however, the Ninth Circuit decided that it was unnecessary to consider whether Section 302(c)(5) continues to have any vitality, because there is authority to review eligibility provisions for reasonableness under the "solely in the interest" clause in Section 404(a)(1) of ERISA, 29 U.S.C. §1104(a)(1). In so deciding, the Ninth Circuit demonstrates that it is unwilling to follow the Supreme Court's decision in *Robinson*. Although the Supreme Court made it clear that "[t]here is no general requirement . . . of reasonableness," *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. at 574, the Ninth Circuit strains to find such a requirement in Section 404(a)(1) of ERISA. Indeed, the Ninth Circuit concludes that Section 404(a)(1) of ERISA authorizes precisely what the Supreme Court said federal courts may not do—review and revise plan provisions under a subjective and "undefined standard of reasonableness." *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. at 574. In doing so, the Ninth Circuit misconstrues Section 404(a)(1) of ERISA.

Section 404(a)(1) of ERISA requires the trustees of an employee benefit plan to administer their trust "solely in the interest of the participants" and "for the exclusive purpose of . . . providing benefits" to them. 29 U.S.C. §1104(a)(1)(A). The Ninth Circuit concludes that this language in Section 404(a)(1) of ERISA empowers federal courts to review and revise pension plan provisions that are unreasonable. The Ninth Circuit fails to note, however, that this language in Section 404(a)(1) of ERISA is virtually duplicated in Section 401(a)(2) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. §401(a)(2). And, Section 401(a)(2) of the Code has never been interpreted to require pension plan provisions to meet a standard of reasonableness.

Section 401(a)(2) of the Internal Revenue Code and its counterpart, Section 404(a)(1) of ERISA, simply incorporate a longstanding requirement of federal tax law—that an employee pension trust will be afforded tax-exempt status only if trust assets accrue to the "exclusive benefit" of the

employees and their beneficiaries.[3] *Pension Benefit Guaranty Corporation v. Ouimet Corp.*, 630 F.2d 4, 9 (1st Cir. 1980), *cert. denied*, 450 U.S. 940 (1981). This requirement initially was imposed upon pension trusts in 1926.[4] The requirement was also contained in each of the revisions or codifications of federal tax law that preceded the enactment of the Internal Revenue Code of 1954. *See, e.g.*, Revenue Act of 1928, §165; Revenue Act of 1936, §165; Internal Revenue Code of 1939, §165(a). And, the requirement was incorporated into Section 401(a)(2) of the Internal Revenue Code of 1954, 26 U.S.C. §401(a)(2)(1954). Under the implementing Treasury Regulations, a pension plan satisfied the "exclusive benefit" requirement of Section 401(a)(2) of the Code if it prevented the employer that established the plan from diverting trust assets to its own use. *See* Treas. Reg. §1.401-2(a)(2)(1964).

The requirement that trust assets be used for the "exclusive benefit" of employees and their beneficiaries was "strictly construed" to deny tax exemption to pension plans that permitted an employer, or its stockholders, to obtain

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[3] The provisions of Title I of ERISA, which includes Section 404(a)(1), are virtually duplicated in federal tax law, as codified in the Internal Revenue Code of 1954, as amended. The Title I requirements of minimum participation, vesting and funding are codified at 29 U.S.C. §§1001-1144; the coordinate tax provisions are set forth in 26 U.S.C. §§401-415. *See Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 and n. 1 (1980).

[4] Section 219(f) of the Revenue Act of 1926 provided, in pertinent part:

> A trust created by an employer as a part of a stock bonus, pension, or profit-sharing plan for the exclusive benefit of some or all of his employees, to which contributions are made by such employer, or employees, or both, for the purpose of distributing to such employees the earnings and principal of the fund accumulated by the trust in accordance with such plan, shall not be taxable . . . .

The language of Section 219(f) was derived from Section 219(f) of the Revenue Act of 1921, which imposed identical requirements upon profit-sharing and stock bonus plans. *See Olstad v. Commissioner*, 32 B.T.A. 670 (1935).

trust assets. *Community Services, Inc. v. United States*, 422 F.2d 1353, 1358 (Ct. Cl. 1970); *Parker v. Commissioner*, 38 B.T.A. 989, 995 (1938). So long as no diversion of trust assets to an employer occurred, however, the pension plan satisfied the "exclusive benefit" rule. *Tavannes Watch Co. v. Commissioner*, 176 F.2d 211, 216 (2d Cir. 1949); *United States v. Kintner*, 216 F.2d 418, 426-28 (9th Cir. 1954).

In short, just as Section 302(c)(5) of the Taft-Hartley Act was designed to prohibit union diversion of pension funds, Section 404(a)(1) of ERISA and its counterpart, Section 401(a)(2) of the Internal Revenue Code, were designed to prohibit employer diversion of such funds. Consequently, so long as a pension trust does not permit payment of benefits to, or use of trust assets by, persons other than employees, the plan is not subject to challenge under Section 404(a)(1) of ERISA. *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. at 574.

To be sure, employee benefit plans are subject to review for compliance with ERISA. The requirements of ERISA are "detailed and comprehensive," *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. at 575, and set forth explicit standards governing participation, vesting and funding, reporting and disclosure, and standards of fiduciary conduct. 29 U.S.C. §§1021-1132. Section 404(a)(1)(D) of ERISA specifies that trustees may not enforce a pension plan provision that contravenes these requirements. 29 U.S.C. §1104(a)(1)(D). And, Congress provided in Section 502 of ERISA that any violation of these standards is subject to challenge in federal courts by a plan participant, beneficiary, or fiduciary, or by the Secretary of Labor. 29 U.S.C. §1132. In the absence of such a violation, however, nothing in ERISA allows a federal court to review and revise a provision of a pension plan because the court finds the provision to be unreasonable. 29 U.S.C. §1132(a)(1)-(5).

The cancellation provision invalidated here by the Ninth Circuit violates none of the standards set forth in ERISA.

To the contrary, Section 203(b)(1) of ERISA expressly provides that pension plans are not required to provide any credit for "years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan . . . ." 29 U.S.C. §1053(b)(1)(C). Moreover, as the District Court and the Ninth Circuit acknowledge, Section 3(37) of ERISA "specifically permit[s] a multiemployer plan to provide for cancellation of past service credit . . ." (App. 21, 41).[5]

The Supreme Court has stated that ERISA is a "comprehensive and reticulated statute." *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361.[6] And, the Supreme Court has emphasized that federal courts are not free to disregard the provisions of ERISA, and "to second guess the policy decisions of the legislature." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 521 (1981). The Ninth Circuit ignored this principle. It chose to disregard the explicit provisions of ERISA in favor of its own conceptions of appropriate pension policy. This was clearly improper. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980).

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[5] The relevant provision in Section 3(37) was recodified as Section 203(a)(3)(E)(i) of ERISA, 29 U.S.C. §1053(a)(3)(E)(i)(Supp. V 1981), by Section 303 of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208, 1292 (1980).

[6] As Congress noted, ERISA contains the "minimum standards . . . assuring the equitable character of [pension] plans and their financial soundness." 29 U.S.C. §1001(a).

CONCLUSION

Upon the foregoing, it is respectfully submitted that a writ of certiorari should be issued to review the decision of the Ninth Circuit in this case.

Respectfully submitted,

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October Term, 1983

I.A.M. National Pension Fund, petitioner

v.

Madge H. Elser, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that federal courts have authority under Sections 404(a)(1) and 502(a) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1104(a)(1) and 1132(a), to review the adoption and application by plan trustees of employee pension benefit plan eligibility requirements.

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Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1325

I.A.M. NATIONAL PENSION FUND, PETITIONER

v.

MADGE H. ELSER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner (the "Fund") operates a multiemployer pension plan. The plan was created in 1960 by the International Association of Machinists and Aerospace Workers (I.A.M.) and several employers of I.A.M.-represented employees (Pet. App. 29a). The plan is administered by trustees designated by the international union and participating employers (*ibid.*). The plan provides that employees must have at least ten years of "credited service" to qualify for pension benefits (*ibid.*). Credited service is comprised of both "past service credit" (*i.e.*, credit for periods of eligible employment prior to an employer's initial contribution) and "future service credit" (*i.e.*, credit for periods of covered

employment during which contributions were actually made) (*ibid.*). An employee with ten years of credited service is entitled to a pension when the employee reaches age 50 (*ibid.*).

The plan provides for retroactive cancellation of all past service credit should an employer cease making contributions to the Fund but remain in business (Pet. App. 30a). Employees whose pensions have vested may thus lose their pensions if their employers cease making contributions to the Fund at a time when the employees have fewer than ten years of future service credit.[1]

The plan contains a number of exceptions to this forfeiture provision (Pet. App. 30a). Past service credit will not be cancelled for employees who already are receiving pensions, and for employees who left their employment more than 24 months before or within 30 days after their employer's termination of participation (*ibid.*). The plan also allows reinstatement of past service credit if the covered employee earns at least five more years of future service credit within eight years of his employer's termination of participation (*ibid.*).

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[1]According to petitioner, the forfeiture provision at issue is required to protect the Fund against unfunded liabilities (Pet. 6-7; footnotes omitted):

> Any unfunded past service liability left behind by employers who withdraw after relatively short periods of participation must * * * be made up by the remaining participants and employers.
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> As a measure of protection against the risk that an employer's participation will *not* continue long enough to discharge his unfunded liability, the Fund Trustees have adopted certain safeguards against employer termination which enable the Fund to avoid any further liability attributable to a terminated employee group's "past service". * * * These provisions are intended to protect the Fund against the "dumping" of unfunded liability attributable to past service by providing employers and employee groups with an incentive to insure that employers' contributions to the Fund continue.

Waste King, the former employer of respondents Madge Elser and Margaret Thomas, began contributing to the pension plan on January 1, 1969, pursuant to its 1968 collective bargaining agreement with I.A.M. District Lodge No. 94 (Pet. App. 30a). In December 1974, approximately 50 of Waste King's employees met to consider decertifying the I.A.M. union as their collective bargaining representative (*ibid.*). The collective bargaining agreement between Waste King and the union expired on January 31, 1975, at which time Waste King ceased contributing to the plan. The union lost a decertification election approximately one month later (*ibid.*). Thereafter, on June 3, 1975, the Fund notified Waste King and the union that, pursuant to the above-described forfeiture provision of the plan, all past service credit accumulated by plan participants who had not left the employ of Waste King 24 months before or 30 days after January 31, 1975, had been cancelled (*ibid.*).[2]

2. On June 30, 1978, Elser and Thomas, individually and on behalf of all others similarly situated, filed an action in the United States District Court for the Central District of California seeking injunctive and declaratory relief pursuant to Section 302(c)(5) and (e) of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. 186(c)(5) and (e), and Sections 404(a)(1) and 502(a) and (e) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1104(a)(1), 1132(a) and (e) (Pet. App. 32a).[3] They sought, *inter alia*, a judgment declaring that the cancellation of past service credit was unlawful, and therefore null

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[2]No plan participant avoided the forefeiture for past service by leaving the employment of Waste King during the 30-day grace period provided by the Fund (Pet. App. 32a).

[3]Section 302(c)(5) of the LMRA is an exception to the prohibition in Section 302 making it "unlawful for any employer or association of employers" to pay any money or other thing of value to employee representatives; it provides that the proscriptions of Section 302 are not applicable:

and void, and that plaintiffs and the class they represented were thus eligible for pensions under the plan (Pet. App. 32a). The plaintiff class consisted of 75 employees or former

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> with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents) * * *.

Section 302(e) of the LMRA, 29 U.S.C. 186(e), provides that the "district courts * * * shall have jurisdiction, for cause shown, * * * to restrain violations of this section * * *".

Section 404(a) of ERISA, 29 U.S.C. 1104(a), provides in pertinent part as follows:

> (1) [A] fiduciary shall discharge his duties with respect to [an employee benefit] plan solely in the interest of the participants and beneficiaries and—
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> > (A) for the exclusive purpose of:
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> > (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan * * *.

Section 502(a) of ERISA, 29 U.S.C. 1132(a), provides in pertinent part that:

> A civil action may be brought—
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> * * * * *
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> (3) by a participant [or] beneficiary * * * (A) to enjoin any act or practice which violates any provisions of this subchapter * * *, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter * * *.

Section 502(e) of ERISA, 29 U.S.C. 1132(e), provides in pertinent part that:

> [T]he district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by * * * a participant [or] beneficiary * * *.

employees of Waste King with at least ten years of continuous service with that employer who had lost their past service credit (*id.* at 33a).[4]

After class certification pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, the district court, based on stipulated facts, entered judgment for respondents, finding that the trustees' actions in adopting and applying eligibility rules for pension benefits that cancelled respondents' past service credit violated both Section 302(c)(5) of the LMRA and Section 404(a)(1) of ERISA (Pet. App. 23a, 24a). The district court concluded that the Fund's forfeiture provisions were arbitrary and capricious on their face and as applied, because they permitted employees who had left Waste King 24 months before it discontinued contributions to receive pensions, but denied pensions to employees who had worked for Waste King for a longer period of time and on whose behalf Waste King had made contributions to the Fund for a longer period of time (*id.* at 6a, 8a).[5] The district court declared the trustees' cancellation action null and void and permanently enjoined the Fund "from calculating service credit for pension purposes as to Plaintiffs Elser and

[4]The district court divided the class into two subclasses. Subclass No. 1 included nonretired employees who left Waste King employment before January 31, 1975, but within 24 months before decertification of the I.A.M. union and withdrawal from the Fund by Waste King (Pet. App. 33a). Subclass No. 2 included persons employed by Waste King at the time of decertification and withdrawal (*ibid.*). There were ten employees in Subclass No. 1 and 65 in Subclass No. 2 (*id.* at 11a).

[5]The district court concluded that there had been a violation of Section 302(c)(5) for two additional reasons: because respondent Thomas did not receive adequate notice of the plan's forfeiture provisions and because the application of the cancellation and relief provisions caused a sizeable exclusion of employees from pension benefits without a reasonable justification for this exclusion (Pet. App. 7a). In light of its disposition of the case (see pages 6-8, *infra*), the court of appeals found it unnecessary to reach these issues (Pet. App. 46a n.19).

Thomas and the class they represent without referring to and applying said employees' past service credit" (*id.* at 21a).

3. The court of appeals affirmed. The court first discussed (Pet. App. 35a) *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 455 U.S. 562 (1982), in which this Court held that the "sole and exclusive benefit" provision of Section 302(c)(5) of the LMRA does not embody any "reasonableness requirement" and that its "plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others" (455 U.S. at 570). The court of appeals observed, however, that the eligibility requirements and benefit levels of the plan considered in *Robinson* had not been established by the plan's trustees but instead had been fixed through a collective bargaining agreement, and that this Court "recognized a distinction" between these two situations (Pet. App. 35a-36a). Nevertheless, the court of appeals concluded that it need not decide whether this distinction authorized it to enforce the fiduciary duties imposed on trustees by the LMRA (*id.* at 37a). Citing this Court's decision in *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 332 (1981), the court of appeals stated that ERISA imposes "strict fiduciary standards" on plan trustees and concluded that it had jurisdiction to review their actions under that statute (Pet. App. 37a).

Having established its jurisdiction under ERISA, the court of appeals held that "[t]he actions of trustees are subject to the same standard of review under the ERISA's fiduciary provisions as they are under the LMRA" (Pet. App. 38a). It stated that "[t]he court's affirmative participation should be limited to 'those cases where the eligibility requirements are so patently arbitrary and unreasonable as to lack foundation in factual basis and/or authority in

governing case or statute law' " (Pet. App. 41a, quoting *Roark* v. *Lewis*, 401 F.2d 425, 429 (D.C. Cir. 1968)). The court added that it would substitute its judgment for that of the trustees " 'only if the actions of the trustees are not grounded on any reasonable basis' " (Pet. App. 41a, quoting *Ponce* v. *Construction Laborers Pension Trust*, 628 F.2d 537, 542 (9th Cir. 1980)).

Applying this standard, the court of appeals noted that the requirements of the plan denied pensions to respondents while giving pensions to employees who had worked a substantially lesser period of time (Pet. App. 42a).[6] In these circumstances, the court concluded, "the Fund had the burden of showing some rational nexus between the Fund's purpose and the forfeiture provisions" (*id.* at 45a-46a).[7] Because the Fund did not offer any actuarial evidence to meet this burden, the court concluded that "the cancellation provisions depriving the [respondents] of past service credit are arbitrary and capricious, and have a structural defect in

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[6]As the court of appeals explained (Pet. App. 42a):

> An employee who left Waste King employment more than twenty-four months before [January 31, 1975] did not forfeit past service credit, even if that employee had only one year of future service and nine years of past service. On the other hand, members of the plaintiff class who had up to six years of employment while Waste King was making payments into the fund, lost all past service credit. Appellees actually worked for a contributing employer for as many as six years and received no benefits, while others who may have worked only one year for a contributing employer could receive benefits (upon reaching age 50) simply because they left the employer more than two years before the union decertification.

[7]In concluding that the Fund had the burden of explaining why "the cancellation provisions * * * were necessary to preserve the financial soundness of the Fund" (Pet. App. 46a), the court of appeals followed the rulings in *Roark* v. *Lewis*, 401 F.2d 425, 429 (D.C. Cir. 1968), and *Central Tool Co.* v. *International Association of Machinists National Pension Fund*, 523 F.Supp. 812, 816-818 (D.D.C. 1981), appeal pending, Nos. 81-2047 & 81-2056 (D.C. Cir.).

violation of § 302 of the LMRA and § 404 of the ERISA * * *" (Pet. App. 46a).[8]

ARGUMENT

The decision below is the first by a court of appeals to address the question whether the federal courts have jurisdiction under the "solely in the interest" requirement of Section 404(a)(1) of ERISA to review the adoption and application by trustees of pension plan eligibility requirements.[9] The court of appeals' affirmative answer to this

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[8]Although the court of appeals did not determine whether the district court had jurisdiction under the LMRA to remedy the alleged violation, it did rely on the well developed substantive law under Section 302(c)(5) relating to the obligations of trustees of Section 302(c)(5) plans. As the Third Circuit has explained (*Knauss* v. *Gorman*, 583 F.2d 82, 86 (1978)):

> Day-to-day discretionary decisions by the administrators of funds are not subject to continuous audit by federal courts. However, where a settled requirement capriciously excludes employees from benefits, it is not the prudence of the plan's administration which is at issue, but the fairness of its basic structure. Such an exclusion constitutes a failure to conform to the "sole and exclusive benefit" requirement, and thus may be reviewed in the federal courts without doing violence to the Congressional intent.

Accord, *Sellers* v. *O'Connell*, 701 F.2d 575, 577 (6th Cir. 1983); *Valle* v. *Joint Plumbing Industry Board*, 623 F.2d 196, 201 n.8 (2d Cir. 1980); *Johnson* v. *Botica*, 537 F.2d 930, 933-934 (7th Cir. 1976); *Alvares* v. *Erickson*, 514 F.2d 156, 165-167 (9th Cir.), cert. denied, 423 U.S. 874 (1975); *Roark* v. *Lewis*, 401 F.2d 425 (D.C. Cir. 1968).

[9]In an earlier decision, *Fentron Industries, Inc.* v. *National Shopmen Pension Fund*, 674 F.2d 1300 (9th Cir. 1982), the court of appeals reached a result similar to that reached here through reliance on a different provision of ERISA. There, the court viewed the divesting of employees' past service credit as an amendment to the plan's vesting schedule. Such an amendment triggered the requirment of Section 203(c)(1)(B) of the Act, 29 U.S.C. 1053(c)(1)(B), that an employee be given an election "to have his nonforfeitable percentage [of his accrued benefit] computed under the plan without regard to such amendment." Because the employees were not given that election, the court struck down the amendment (674 F.2d at 1306). The court expressly declined to decide whether the trustees' conduct also violated other provisions of ERISA (*id.* at 1306 n.8).

jurisdictional question does not conflict with any decision of this Court or of any other federal court. Moreover, it accords appropriate recognition to Congress' comprehensive purposes in enacting ERISA, including the goal of "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and * * * providing for appropriate remedies, sanctions, and ready access to the Federal courts" (29 U.S.C. 1001(b)). In these circumstances, we suggest that further review is unnecessary.

It is also important to emphasize that the petition in this case is essentially limited to the jurisdictional issue of reviewability of the trustees' decisions to include particular benefit eligibility provisions in their pension plans. In our submission, the court of appeals correctly resolved that issue. Because it is unnecessary to do so in the posture of this case, we take no position on the question whether the court of appeals correctly invalidated the forfeiture provision at issue in petitioner's plan. We note only our view that judicial oversight of pension plan trustees' decisions should be governed by a highly deferential standard of review; we do not here endorse the notion that the trustees' decisions must satisfy a court's concept of the best way to achieve the plan's aims. But whether the court of appeals applied a sufficiently deferential standard of review with regard to the particular plan provision challenged by respondents is a fact-bound issue not requiring this Court's consideration.

1. Petitioner principally contends (Pet. 14) that there is a "patent conflict" between the decision of the court of appeals and this Court's decision in *Robinson*. Although there is obviously some surface similarity between *Robinson* and the decision below, the court of appeals could reasonably conclude that *Robinson* is not controlling here

for two distinct reasons. First, *Robinson* did not decide whether federal courts are authorized to review pension plan eligibility provisions imposed by plan trustees; the decision was concerned only with provisions arrived at through collective bargaining. Second, *Robinson* dealt with the federal courts' reviewing authority under the LMRA, not ERISA.

a. In *Robinson*, the United Mine Workers and the Bituminous Coal Operators' Association agreed, after " 'explicit, informed and intense bargaining' " (455 U.S. at 569), to a provision in their collective bargaining agreement that discriminated between two classes of widows of coal miners who died prior to December 6, 1974. Widows of miners who had continued to work after they were entitled to pensions and who had spent most of their working lives in the employ of contributing employers were denied lifetime health benefits, while widows of employees who had elected to receive their pensions received such lifetime benefits. The court of appeals, relying on Section 302(c)(5), held that any rule denying benefits to employees on whose behalf significant contributions had been made must be satisfactorily explained, particularly if benefits were authorized for others who had worked a lesser period of time. *Robinson* v. *United Mine Workers of America Health & Retirement Funds*, 640 F.2d 416, 421 (D.C. Cir. 1981).

This Court reversed. It held that Section 302(c)(5) of the LMRA does not authorize federal courts to review for reasonableness the provisions of a collective bargaining agreement allocating health benefits among potential beneficiaries of an employee benefit trust fund. The Court concluded that the plain meaning of Section 302(c)(5) "is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others"

(455 U.S. at 570). The Court emphasized that the "nondiversion purpose" of Section 302(c)(5) was "amply supported by the legislative history" (455 U.S. at 571)[10] and by the fact that Section 302(c)(5) is an exception to a criminal statute (455 U.S. at 572).

The Court distinguished authorities relied upon by the court of appeals as cases in which "trustees of employee benefit trust funds, not the collective-bargaining agreement, fixed the eligibility rules and benefit levels" (455 U.S. at 573).[11] By contrast, the Court noted that in *Robinson* (*id.* at 573-574) (footnote omitted):

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[10]The Court noted (455 U.S. at 571-572) that:

> [Section 302(c)(5)] was meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders. Proponents of this section were concerned that pension funds administered entirely by union leadership might serve as "war chests" to support union programs or political factions, or might become vehicles through which "racketeers" accepted bribes or extorted money from employers.

[11]The Court continued (455 U.S. at 573) (footnote omitted):

> The Court of Appeals has held in those cases "that the Trustees have 'full authority . . . with respect to questions of coverage and eligibility' and that the court's role is limited to ascertaining whether the Trustees' broad discretion has been abused by the adoption of arbitrary or capricious standards." *Pete* v. *United Mine Workers of America Welfare & Retirement Fund of 1950*, 171 U.S. App. D.C. 1, 9, 517 F.2d 1275, 1283 (1957) (en banc) (footnote omitted). Noting that "[t]he institutional arrangements creating this Fund and specifying the purposes to which it is to be devoted are cast expressly in fiduciary form," the court stated that "the Trustees, like all fiduciaries, are subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run." *Kosty* v. *Lewis*, 115 U.S. App. D.C. 343, 346, 319 F.2d 744, 747 (1963), cert. denied, 375 U.S. 964. Those cases, however, provide no support for the Court of Appeals' holding in this case.

> The petitioner trustees were not given "full authority" to determine eligibility requirements and benefit levels, for these were fixed by the 1974 collective-bargaining agreement. By the terms of the trust created by that agreement, the trustees are obligated to enforce these determinations unless modification is required to comply with applicable federal law. The common law of trusts does not alter this obligation.

Accordingly, the Court expressly declined to decide whether federal courts sitting as courts of equity are authorized to enforce traditional fiduciary duties imposed upon Section 302(c)(5) trustees (455 U.S. at 573 n.12).

b. This case presents no occasion for the Court to decide the issue that it left open in *Robinson* because the court of appeals rested its jurisdiction on ERISA rather than the LMRA. Nevertheless, it is worth noting that every court that has considered the issue has rejected petitioner's argument that *Robinson* foreclosed the very question that it expressly left open. *Sellers* v. *O'Connell*, 701 F.2d 575, 577 (6th Cir. 1983) ("Absent a clearer indication that *Robinson* governs trust fund rules formulated by trustees as well as those included in collective bargaining agreements, we hold that [29 U.S.C.] § 186(e) provides jurisdiction over [claims that pension fund eligibility rules are arbitrary and capricious]"); *Hurn* v. *Retirement Fund Trust of the Plumbing, Heating & Piping Industry*, 703 F.2d 386, 389 (9th Cir. 1983); *Harm* v. *Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 n.4 (9th Cir. 1983); *Sinai Hospital of Baltimore, Inc.* v. *National Benefit Fund for Hospital & Health Care Employees*, 697 F.2d 562, 567-568 (4th Cir. 1982); *Dudo* v. *Schaffer*, 551 F.Supp. 1330, 1337-1338 (E.D. Pa. 1982); *Kozlesky* v. *Board of Trustees*, 546

F. Supp. 466, 468 n.1 (E.D. Mich. 1982).[12] All of these courts have relied on the distinction, recognized in *Robinson*, between collectively-bargained and trustee-determined eligibility requirements to conclude that federal courts are authorized to review trustee-determined requirements under an arbitrary and capricious test.[13]

c. Irrespective of what the outcome in this case would be if it had arisen solely under Section 302(c)(5) of the LMRA, the complaint also charged a violation of Section 404 of ERISA, and the court of appeals based its jurisdiction to review the trustees' action on that statute. In these circumstances, *Robinson* is not controlling.

As the Court noted in *Robinson, supra*, 455 U.S. at 572, Section 302(c)(5) is an exception to a criminal provision in the LMRA, the purpose of which is to assure the non-diversion to unions of employer contributions to pension trusts. Arguably, the goals of Section 302(c)(5) are fully satisfied so long as no diversion of employer contributions occurs. That may be particularly so because "judicial review

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[12]The Fund relies on this Court's summary action in *Western Conference of Teamsters Pension Trust Fund* v. *Music*, No. 81-2283 (Oct. 4, 1982), reversed on remand, (9th Cir. Aug. 2, 1983), in which the Court vacated the judgment of the court of appeals and remanded for further consideration in light of *Robinson*. *Music* involved pension eligibility provisions fixed by fund trustees. The Ninth Circuit, in its subsequent opinion in *Hurn, supra*, decided after the *Music* remand, found *Robinson* "inapplicable" on the ground that *Robinson* involved a collective bargaining agreement (*Hurn, supra*, 703 F.2d at 389).

[13]Petitioner contends (Pet. 16 n.15) that it makes no sense to draw a distinction between collectively-bargained and trustee-determined eligibility requirements because "it would be a simple matter for collective bargaining parties routinely to shield trustee-adopted eligibility rules from scrutiny by simply incorporating them by reference into collective bargaining agreements." But there is no need at this juncture for the Court to concern itself with speculation as to the effect of conduct that might be taken in the future to avoid a particular judicial result.

under an undefined standard of reasonableness" (*Robinson, supra*, 455 U.S. at 574) makes uncertain the standard of conduct needed to escape criminal responsibility.

In contrast to Section 302 of the LMRA, ERISA is remedial civil legislation. As this Court has observed, it is a " 'comprehensive and reticulated statute,' which Congress adopted after careful study of private retirement pension plans." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981), quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 362 (1980). It was enacted to assure " 'the continued well-being and security of millions of employees and their dependents * * * directly affected' " by employee benefit plans (29 U.S.C. 1001(a)). ERISA imposes myriad obligations on employers and trustees respecting the manner in which pension and welfare benefit plans are established, administered and terminated.[14] There can be no doubt that Congress contemplated and intended comprehensive regulation of the activities of employee benefit plan fiduciaries.

Against the background of this network of regulation, petitioner's contention that *Robinson* should be read to limit the scope of Section 404 is unpersuasive. Section 404's requirement that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" clearly places bounds on the manner in which plan trustees may administer pension eligibility rules. See *Winpisinger* v. *Aurora Corp.*, 456 F. Supp. 559, 566 n.4,

[14]As this Court noted in *Alessi, supra*, 451 U.S. at 510 n.5, "[t]o ensure that employee pension expectations are not defeated, the Act establishes minimum rules for employee participation, §§ 1051-1061; funding standards to increase solvency of pension plans, §§ 1081-1085; fiduciary standards for plan managers, §§ 1101-1114; and an insurance program in case of plan termination, §§ 1341-1348 (1976 ed. and Supp. III)."

573 (N.D. Ohio, 1978). That conclusion follows not only because the Act incorporates common law fiduciary duties, see *NLRB* v. *Amax Coal Co., supra*, 453 U.S. at 331-332,[15] but also because it amplifies those obligations and requires courts to "interpret * * * fiduciary standards bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act." H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 12 (1973); S. Rep. No. 93-127, 93d Cong., 1st Sess. 29 (1973). A major purpose of the Act was to end employer practices that had resulted in "many employees * * * losing anticipated retirement benefits owing to the lack of vesting provisions in [pension] plans." 29 U.S.C. 1001(a). Congress rectified this situation by enacting minimum vesting standards (29 U.S.C. 1053(a)(2)) and imposed upon trustees in the administration of those standards "a duty of fairness to all—not just some of the covered employees." *Winpisinger* v. *Aurora Corp., supra*, 456 F.Supp. at 573.

It is equally clear that federal courts have jurisdiction to entertain an action charging a breach of these duties. The jurisdictional provisions of the Act permit participants and

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[15]For example, the House Report on ERISA states (H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 295 (1974)):

> *Fiduciary responsibility rules, in general*
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> The conference substitute establishes rules governing the conduct of plan fiduciaries under the labor laws (title I) * * *. The labor law provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries.

Similarly, Representative Dent, a leading sponsor of ERISA, stated that "[t]hese standards, embodying existing trust concepts, will prevent abuses of the special responsibilities borne by those dealing with plans." 120 Cong. Rec. 29196-29197 (1974). Senator Williams, a leading sponsor in the Senate, stated that "[t]he objectives of these provisions are to make applicable the law of trusts." 120 Cong. Rec. 29932 (1974).

beneficiaries (as well as the Secretary of Labor) to bring civil actions to enjoin any act or practice that violates the Act and to obtain appropriate equitable relief and redress of violations. 29 U.S.C. 1132. Accordingly, the court of appeals correctly held that the district court had jurisdiction under ERISA to scrutinize the trustees' actions in adopting and implementing the eligibility rules in this case.[16]

2. Petitioner also contends (Pet. 18-22) that the decision below authorizes courts to impose more stringent substantive standards of pension eligibility than are required by ERISA. As petitioner correctly notes (Pet. 18-20), ERISA does not require *any* credit for preplan service, nor does it prohibit the cancellation of past service credit when an employer ceases contributions to the plan. See 29 U.S.C. (&

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[16]At common law trustees had an obligation to deal impartially with the beneficiaries of the trust. In the ERISA context, carrying out that obligation does not necessarily require that each beneficiary be treated identically. Thus, the court of appeals may have placed too heavy a burden of explanation on plan trustees when it held that they must show "that the [forfeiture] provisions were necessary to protect the financial soundness of the Fund" (Pet. App. 46a). See also page 9, *supra*. But there is no need for review of this issue, because the Ninth Circuit has clarified the point in a subsequent decision. In *Harm* v. *Bay Area Pipe Trades Pension Plan Trust Fund*, *supra*, 701 F.2d at 1306 n.7, the court explained:

> Only some decisions need be shown "necessary to protect the soundness of the Fund." If, as in *Elser*, the only explanation offered for a change in benefits is that it was compelled by financial necessity, there must be some evidence that such is the case. Other rules may represent a choice among competing policies or rely on behavorial predictions that are not susceptible to verification. In this latter group are the break-in-employment rules, which rest on the trustees' prediction that employees will be encouraged to seek continuing employment in the industry, rather than shift to other industries. * * * Rules that require policy selection or matching of actuarial probabilities to the conditions of an industry fall more fully to the trustees' discretion. * * * The trustees can act in these areas without a showing of financial necessity.

Supp. V) 1053(a)(3)(E)(i) and 1053(b)(1)(C). But these provisions do not create an absolute "safe harbor"; the trustees' actions still must satisfy the trustees' overriding fiduciary obligations imposed by Section 404(a) of the Act. The decision below simply recognizes that where, as here, plan trustees determine to invoke in limited fashion the statutory provisions authorizing forfeiture of past service credit, such determinations may be reviewed for compliance with ERISA's "solely in the interest" requirement. As the district court noted (Pet. App. 8a), "§ 3(37) [[17]] does not validate provisions that are otherwise objectionable because they are discriminatorily applied."[18]

For the same reason, petitioner errs in suggesting (Pet. 18-21) that the court of appeals' decision conflicts with *Alessi* v. *Raybesto-Manhattan, Inc., supra.* In that case, the Court concluded that Congress had implicitly authorized plans to integrate pension benefits with workers' compensation awards received after retirement. Because ERISA was intended to preempt state law, the Court held that New

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[17]Section 3(37)(A)(iv) of ERISA, 29 U.S.C. 1002(37)(A)(iv), has been superseded by Section 303(E)(i) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1292, 29 U.S.C. (Supp. V) 1053(a)(3)(E)(i). The two provisions are essentially identical, however, and thus Section 3(37) was deleted from ERISA by the 1980 amendments as superfluous. See 94 Stat. 1291-1292.

[18]A similar argument was rejected in *Donovan* v. *Bierwirth*, 680 F.2d 263 (2d Cir. 1982), cert. denied, No. 82-422 (Dec. 6, 1982). There, pension plan trustees contended that they were not in violation of Section 404(a) so long as their actions complied with other, specific provisions of ERISA, including the provision allowing a plan to invest up to 10% of its assets in employer securities (29 U.S.C. 1107(a)(2)). The court of appeals disagreed, noting that the trustees had bought additional employer securities, up to the 10% maximum, at "the worst possible time" from an investment standpoint (680 F.2d at 275). The court concluded that the trustees' conduct did "not measure[] up to the high standards imposed by § 404(a)(1)(A) and (B) of ERISA" (680 F.2d at 276).

Jersey lacked authority to forbid such plan provisions (451 U.S. at 521-526). There was no contention in that case that the integration rules were being applied in an arbitrary and capricious manner, nor any allegation that the fiduciary obligations imposed by ERISA had been violated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1983

No. 82-1325

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

I.A.M. NATIONAL PENSION FUND,
Petitioner,
v.
MADGE H. ELSER and MARGARET E. THOMAS, individually and on behalf of all others similarly situated,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S SUPPLEMENTAL BRIEF IN REPLY TO THE BRIEF FOR THE UNITED STATES

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The Solicitor General opposes our petition because the "limited . . . jurisdictional issue of reviewability of the trustees' decisions to include particular benefit eligibility provisions in their pension plans" (SG Br. at 9) does not, in his judgment, merit this Court's review. He is able to reach that conclusion, however, only by materially modifying petitioner's definition of the issue presented. He dismisses as "fact-bound" (*id.*) the quite distinct issue of reviewability *for reasonableness* which is at the heart of this case, even while implicitly acknowledging that the lower court's resolution of that issue was erroneous. We respectfully suggest that, correctly understood, the Solicitor General's views are not persuasive.

1. The issue presented by the petition is whether trustee-determined pension benefit eligibility rules which comply in every respect with the detailed minimum participation, vesting, benefit accrual, and fiduciary responsibility standards prescribed in ERISA may nevertheless be set aside by a district court if the trustees are unable

to persuade the court that those rules are, in the lower court's phrase, "necessary or reasonable." (Pet. App. 46(a)).[1] Because the court was not authorized to add any such amorphous, undefined standard to the "myriad obligations [ERISA imposes] on . . . trustees" (SG Br. at 14), the court exceeded its jurisdiction when it did so.[2]

Apparently unwilling directly to confront the "review for reasonableness" issue raised in the petition, the Solicitor General has redefined the issue in a way which avoids direct confrontation. By omitting from his definition of the issue presented (SG Br. at I) any reference to the "reasonableness" standard which is at the heart of this controversy, the Solicitor General is able to assert (*id.* at 9) that this case is "essentially limited to the jurisdictional issue of reviewability," and to recommend against review of *that* issue because "federal courts have jurisdiction to entertain an action charging a breach of [ERISA's fiduciary] duties" (*id.* at 15).

The argument is a classic straw man. It is not our contention that no judicial authority exists to correct trustee breaches of their fiduciary duties, or that "[*United Mine Workers Health and Retirement Funds v.*] *Robinson* [,455 U.S. 562 (1982),] should be read to limit the scope of Section 404" of ERISA (SG Br. at 14) in a way which infringes that authority. We *do* contend that Section 404

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[1] The petition presents this issue in the form of two separate, but obviously related questions. The first, recognizing the exclusive reliance the court below placed on the line of cases construing LMRA § 302(c)(5), raises the issue of whether the "reasonableness" standard applied below conflicts with *United Mine Workers Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982), while the second raises the issue of whether review for "reasonableness" is authorized by ERISA in the circumstances present here.

[2] "Jurisdiction is essentially the authority conferred by Congress to decide a given type of case one way *or the other* (emphasis added)." *Hagans v. Lavine*, 415 U.S. 528, 538 (1974); *Cowan v. Keystone Employee Profit Sharing Fund*, 586 F.2d 888 (1st Cir. 1978).

is limited to its terms, and that those terms do not authorize the courts to impose, on an undefined, *ad hoc* basis, their own "concept of the best way to achieve the plan's aims" (*id.* at 9). The court below clearly held that it has the authority to do precisely that, and it is that holding which requires this Court's review.

2. The Solicitor General's assertion that no *Robinson* issue is presented by our petition (*id.*) is betrayed by his own analysis of that decision. He defends the court's conclusion that, because *Robinson* involved collectively-bargained, rather than trustee-determined eligibility rules, the *Robinson* analysis of the intended reach of LMRA § 302(c)(5) has no applicability to cases involving trustee-established rules. He makes no effort, however, to square that assertion with his recognition (*id.* at 10-11, 13-14) that Section 302(c)(5) is a criminal statute, the sole purpose of which was to prohibit diversion of trust fund assets to union purposes. He recognizes, indeed, as did this Court in *Robinson*, that "the goals of Section 302(c)(5) are fully satisfied so long as no diversion of employer contributions occurs" (*id.* at 13).[3] The Solicitor General does not explain how the criminal character and exclusivity of the nondiversion purpose of Section 302(c)(5) disappear when eligibility rules are set by trustees rather than collective bargaining parties. His self-defeated assertion that the Ninth Circuit might "reasonably conclude" (*id.* at 9) that Section 302(c)(5) also imposes "an undefined standard of reasonableness" on trustee-determined, but not collectively-bargained, rules (*id.* at 14), quoting *Robinson*, 455 U.S. at 574, is inexplicable.

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[3] In other circumstances, the Ninth Circuit has also recognized this nondiversion objective as the goal of Section 302(c)(5). *See, e.g., Maxwell v. Lucky Construction Co.*, 710 F.2d 1395, 1398 (9th Cir. 1983):

> The congressional objective in enacting [LMRA] § 302 was to inhibit corrupt practices in the administration of employee welfare funds established through the collective bargaining process.

The Solicitor General alternatively asserts that, because the court of appeals ultimately "rested its jurisdiction on ERISA rather than the LMRA" (*id.* at 12), *Robinson* is, in any case, inapplicable here. That proposition, too, is untenable because, as the Solicitor General fully recognizes, the court in analyzing its authority under ERISA § 404(a)(1) drew exclusively upon what the Solicitor General describes, somewhat curiously, in light of his own understanding of the scope of § 302(c)(5), as "the well developed substantive law under Section 302(c)(5)" (*id.* at 8, n. 8). Given his recognition of that reliance, the Solicitor General ventures no explanation of how the validity of the court's extrapolation of § 302(c)(5) into § 404(a)(1) is to be assessed if not by exploring the correctness of the body of decisional law upon which the court relied. As to *that* essential question—whether the body of pre-ERISA Section 302(c)(5) law is, in fact, "well developed" or is, as the Solicitor General acknowledges (*id.* at 13-14), fundamentally flawed—*Robinson* clearly is controlling. The Solicitor General's demonstration (*id.* at 12) that numerous lower courts have continued, in common with the court of appeals, to disregard *Robinson* is graphic evidence that, his recommendation notwithstanding, the issue once again requires this Court's attention.

3. Implicit in the Solicitor General's assertion that *Robinson* has no applicability here is the suggestion that, without regard to how LMRA § 302(c)(5) ought correctly to be construed, ERISA § 404 independently authorizes court review, *for reasonableness*, of trustee determinations of benefit eligibility rules. In the Solicitor General's judgment, such uncabined judicial authority over trustee decisions "accords appropriate recognition to Congress' comprehensive purposes in enacting ERISA" (SG Br. at 9). He implies, moreover, that because ERISA is civil, not criminal, legislation, there is no need to define with particularity "the standard of conduct needed to" comply with its provisions (*id.* at 14). Be-

cause Congress has imposed "myriad obligations on employers and trustees respecting the manner in which pension and welfare benefit plans are established, administered and terminated" (*id.*), the Solicitor General illogically concludes that the courts must remain free to impose *additional* standards, more stringent than those specified in the statute, and improvised *ad hoc* whenever in a court's judgment such additional standards are necessary to render a plan of benefits reasonable.

The argument reflects, we submit, rather a strange approach to the task of statutory construction.[4] Insofar as it purports to reflect the policy goals of ERISA, moreover, the proposition that the purposes of ERISA require courts to engage in unrestrained, undefined case-by-case review to determine whether trustees' actions are reasonable represents, at best, a myopic assessment of those goals. Indeed, two such goals—the establishment of uniform substantive minimum standards and the preservation of the freedom of trustee decision-making—will be directly subverted if the decision below stands.

As the legislative history of ERISA demonstrates, the fiduciary responsibility provisions of that Act were intended, among other purposes, to

> bring a measure of uniformity in an area [i.e., fiduciary responsibility] where decisions under the same set of facts may differ from state to state.

H.R. Rep. No. 93-533, 93d Cong., 1st Sess. 12 (1973); S. Rep. No. 93-127, 93d Cong., 1st Sess. 29 (1973). Congress recognized, moreover, as the Solicitor General apparently does not, that

> [t]he uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and

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[4] As this Court has often affirmed, *see e.g., City of Milwaukee v. States of Illinois and Michigan,* 451 U.S. 304, 317 (1981), "it is for Congress, not the federal courts, to articulate the appropriate standards to be applied as a matter of federal law."

> participants to predict the legality of proposed actions. . . .

Id. (both authorities).

Congress also recognized, as the Solicitor General apparently does not, that

> the legislative approach of establishing minimum standards and safeguards for private pensions is . . . consistent with the retention of freedom of decision-making vital to pension plans. . . .

H.R. Rep. No. 93-533, *supra*, at 9. The continued application of the construction of ERISA § 404(a) formulated by the court below and endorsed here by the Solicitor General is fundamentally at odds with the goals of certainty and uniformity of standards, and freedom of private decision-making within the bounds set by those standards, which Congress believed it accomplished in ERISA. So long as courts are permitted, under the facile "arbitrary and capricious" rubric,[5] to superimpose their own subjective judgments upon those carefully drawn by the Congress, trustees will never be able confidently to predict the legality of the benefit eligibility standards they have chosen, even when, as in this case, those standards fully comply with the detailed substantive minima set forth in the Act.

4. In his defense of the decision below, the Solicitor General points to ERISA's clear creation of judicial au-

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[5] In the line of § 302(c)(5) cases upon which the court relied, the terms "arbitrary and capricious" have long since lost any real meaning. They are now routinely used, as the Ninth Circuit's decision on remand in *Music v. Western Conference of Teamsters Pension Trust Fund,* No. 79-4251 (9th Cir. August 2, 1983) (copy reprinted in Appendix to Respondents' Second Supplemental Brief) attests, to describe any rule which, in the court's judgment, operates "unreasonably" against the interest of the participant who brings a challenge. "[W]e know [however] from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting." *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577 (1978).

thority "to enjoin any act or practice that violates the Act" (SG Br. at 16). Like the court of appeals, however, the Solicitor General finds it impossible to articulate what fiduciary duty petitioner's trustees breached. To be sure, he vaguely implies that reversal of the decision below would, in some unarticulated fashion, inhibit the courts' authority to compel trustee compliance with the statutory rules governing fiduciary responsibility (*id.* at 14-16). That red herring, however, serves only to obscure the real issue posed by our petition. The central question here is not whether ERISA empowers courts to remedy violations of the fiduciary responsibility provisions of the Act, which it clearly does. Rather, the question is whether the "solely in the interest" requirement of Section 404(a)(1), upon which the court of appeals and the Solicitor General rely, commands anything more than that trustees refrain from dealing with plan assets in the interests of persons *other than* participants and beneficiaries of the plan.

The court below read into Section 404(a)(1) an affirmative, albeit totally undefined obligation to deal "reasonably" *as among* participants and beneficiaries. The Solicitor General, conceding that there is no fiduciary obligation, either at common law or under ERISA, to treat "each beneficiary . . . identically" (SG Br. at 16, n.16), and acknowledging his doubt that "the burden of explanation" placed on the trustees by the lower court was authorized by ERISA (*id.*), inexplicably insists nevertheless that ERISA § 404(a)(1) conferred jurisdiction for the court to rule as it did.

The genesis of this fundamental error is, we suggest, not difficult to identify. It lies in the conceptual misapprehension of the nature of the fiduciary obligations imposed by ERISA § 404(a)(1). Both the legislative history of that section and the common law antecedents of the "solely in the interest" language upon which the court and the Solicitor General rely—sources, it must be noted, which neither the court below nor the Solicitor General

found it appropriate to examine—make clear that the standard of fiduciary conduct embodied in that phrase is prohibitory, not affirmative.[6] That is to say, Section 404(a)(1) *forbids* fiduciaries from dealing with the plan in their own interests, or in the interests of non-participant, non-beneficiary third parties. Absent fiduciary self-dealing, however, the "solely in the interest" phrase does not impose any substantive, affirmative standards governing allocation of benefits as among participants and beneficiaries.

Perhaps the most detailed explanation of the "solely in the interest" phrase in ERISA § 404(a)(1) originated with the Department of Labor. In an interpretive memorandum placed into the legislative record by Senator Javits, one of ERISA's principal sponsors in the Senate, the Department explained that, drawing upon the common law, ERISA would obligate a fiduciary

> to act *solely in the interest* of the participants and beneficiaries of the plan; *that is, to refrain from involving himself in situations* or transactions (especially transactions with known parties in interest) *where his personal interests might conflict with the interests of the participants and beneficiaries* for whom the fund was established (emphasis added).

119 Cong. Rec. 12076 (April 12, 1973).

We think this memorandum confirms beyond doubt that Congress understood the "solely in the interest" language in § 404(a)(1) to be a prohibition against self-dealing, and nothing more. Until the decision below, no court had imputed to Section 404(a)(1) the quite different "un-

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[6] The "solely in the interest" standard is a term which has acquired "accumulated settled meaning under . . . equity." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-30 (1981). At common law, the phrase is shorthand for the duty of loyalty which the common law of trusts imposes on fiduciaries. Restatement (Second) of Trusts § 170(1) (1959). The duty of loyalty obligates fiduciaries not to engage in self-dealing with the trust. *Id.*

defined standard of reasonableness," *Robinson*, 455 U.S. at 574, which the lower court found.[7] The Ninth Circuit now routinely so construes that provision. *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir. 1983) ("We have implemented [ERISA § 404] with the 'structural defect' test. Under it rules that exclude employees from receiving benefits, for reasons which are arbitrary and capricious violate section 404"); *Music, supra* note 5. The Solicitor General's wistful suggestion that that court has sufficiently "clarified" its view of the scope of its power under Section 404(a)(1) (SG Br. at 16, n.16) has, moreover, now lost whatever questionable validity it might previously have had. For as the court's opinion in *Music* on remand makes abundantly clear, the Ninth Circuit still believes that ERISA § 404(a)(1) empowers federal courts to demand that trustees "come forward with evidence establishing the reasonableness of [any] eligibility requirement" (Resp. 2d Supp. Br. App. at 9a) whenever such a requirement "seems [to the court] unreasonable" (*id.* at 9a, 10a). In *Music*, moreover, as in this case, the court believed its open-ended mandate under Section 404(a)(1) included the authority to enjoin as "unreasonable" an eligibility rule specifically authorized by Congress, and to reject as "not persuasive" the very rationale upon which Congress relied (*id.* at 10a & n.10).

Unless the decision below is reviewed and reversed by this Court, lower federal courts will continue improperly

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[7] *Winpisinger v. Aurora Corp.*, 456 F. Supp. 559 (N.D. Ohio 1978), and *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir.), *cert. denied*, 103 S. Ct. 488 (1982), cited by the Solicitor General, nicely demonstrate this point. In both cases the courts found facts which demonstrated that the trustees had acted in the interests of a party other than a participant or beneficiary, and thus had violated the Section 404(a)(1) prohibition against self-dealing. In *Aurora*, the institutional interests of the union were served by exempting union members from a service credit cancellation applied to similarly situated non-members, while in *Bierwirth* the plan's assets were used—disadvantageously to the plan—to fight off a hostile takeover attempt aimed at the plan sponsor-employer.

to draw from ERISA § 404(a)(1) a broad, undefined power, never conferred by Congress, to review and modify pension plan benefit eligibility rules which comply in every detail with the statutory scheme Congress has devised.

The Solicitor General correctly notes (SG Br. at 8) that the decision below is the first appellate decision which relied on ERISA § 404(a)(1) as the source of authority to review pension eligibility rules for reasonableness. The question which this petition presents is, therefore, "an important one of first impression" (*American Federation of Musicians v. Wittstein*, 379 U.S. 171, 175 (1964)). For these reasons, we again respectfully urge that this Court grant certiorari to decide "whether the Court of Appeals ha[s] gone too far in substituting its own judgment as to proper [benefit eligibility] practices in the case of a [pension benefit plan] which claim[s] the practices it ha[s] chosen [do] not violate [ERISA]." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 574 (1978).

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